(16,738.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 203.

THE WASHBURN AND MOEN MANUFACTURING COMPANY, PETITIONER,

vs.

THE RELIANCE MARINE INSURANCE COMPANY (LIMITED).

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court of the United States for the district of Massachusetts.

Judgment in circuit court (Putnam J.), October 2, 1897.

Certified Copy of Record and All Proceedings in said Cause to and Including November 10, 1897.

Eugene P. Carver, Edward E. Blodgett, for Washburn and Moen Manufacturing Company.
Francis C. Lowell, Frederick J. Stimson, A. Lawrence Lowell, for Reliance Marine Insurance Company.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1895.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Writ of Error in No. 156.

[L. S.] UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before

you, or some of you, between The Washburn and Moen Manufacturing Company, plaintiff, and The Reliance Marine Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, The Washburn and Moen Manufacturing Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massachu-
2 setts, on the twenty-fifth day of November next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
W. L. PUTNAM,
U. S. Circuit Judge.

Return of Circuit Court Thereon.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss*:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

Writ of Error in No. 157.

[L. S.] UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Washburn and Moen Manufacturing Company, plaintiff, and The Reliance Marine
3 Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, The Reliance Marine Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twenty-fifth day of November next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
W. L. PUTNAM,
U. S. Circuit Judge.

Return of Circuit Court Thereon.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss*:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to

the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

4 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals Nov. 25, 1895.)

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-five, before the Honorable Le Baron B. Colt, circuit judge.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant. } No. 356, Law Docket.

In an action of contract, *ad damnum*, $100,000.

The writ in this cause is dated Sept. 27, 1893, and is made returnable before the justices of the superior court of the Commonwealth of Massachusetts, to be holden at Boston, within and for the county of Suffolk, on the first Monday of November, A. D. 1893. After due entry of this writ in said superior court, this cause was removed to this circuit court and here entered at the May term, A. D. 1894, when and where the parties appeared by their respective attorneys. Upon the entry of this cause in this circuit court, attested copies of papers on file in said superior court were filed in this court, as follows:

(1.) *Writ.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

[L. S.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Reliance Marine Insurance Company, a corporation duly organized
5 and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and having a usual place of business in Boston, in the county of Suffolk and Commonwealth aforesaid, to the value of one hundred thousand (100,000) dollars,

and summon the said defendant (if it may be found in your precinct) to appear before our justices of our superior court, to be holden at Boston, within and for our said county of Suffolk, on the first Monday of November next, then and there in our said court to answer unto the Washburn & Moen Manufacturing Company, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and having a usual place of business in Worcester, in the county of Worcester and Commonwealth aforesaid, in an action of contract to the damage of the said plaintiff (as it says) the sum of one hundred thousand (100,000) dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession goods and estate to the value of one hundred thousand (100,000) dollars aforesaid, which can be come at to be attached, but has intrusted to and deposited in the hands and possession of the Atlantic national bank, a corporation duly organized and existing under and by virtue of the laws of the United States of America, and having a usual place of business in said Boston, trustee of the said defendant's goods, effects and credits, to the said value: we command you, therefore, that you summon the said supposed trustee (if it may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects or credits, in the hands and possession of the said trustee.

And have you there this writ with your doings therein.

Witness, Albert Mason, Esquire, at Boston, the twenty-seventh (27th) day of September, in the year of our Lord one thousand eight hundred and ninety-three.

JOS. A. WILLARD, *Clerk.*

Copy.

Attest: JOS. A. WILLARD, *Clerk.*

6 *Return on Writ.*

SUFFOLK, *ss:*

BOSTON, *Sept.* 28, 1893.

By virtue hereof, I this day, at thirty-five minutes past nine o'clock a. m., summoned the within-named trustee, the Atlantic national bank, to appear and show cause at court, as within directed, by delivering to James T. Drown, its cashier, an attested copy of this writ, and afterwards, on said twenty-eighth day of September, I attached a chip as the property of the within-named defendant, The Reliance Marine Insurance Company, and summoned it to appear and answer at court, as within directed, by delivering an attested copy of this writ to the insurance commissioner of this Commonwealth, he being the true and lawful attorney to accept

service for said company, and paid him the statute fee of two dollars.

FRED H. SEAVEY,
Deputy Sheriff.

Service and travel	$1 08
Copies	2 00
Paid commissioner	2 00
	$5 08

(2.) *Declaration.*

(Filed in State court Nov. 6, 1893.)

First Count. And the plaintiff says the defendant company made to it a policy of insurance in the sum of forty-eight thousand eight hundred dollars ($48,800), on the cargo of wire on board the schooner Benjamin Hale valued at said sum, said insurance being against the perils of the sea and other perils therein mentioned, at and from Boston to Galveston or Velasco, Texas. A copy of said policy is hereto annexed, marked "A," and made a part of this declaration.

That while the said schooner Benjamin Hale was proceeding on said voyage with said cargo on board, she struck a rock, filled with water and sank, and the said cargo of wire became totally lost by perils insured against.

7 That while the said schooner with the said cargo of wire on board was in peril, the said plaintiff duly abandoned the said cargo to the said defendant company on April 29, 1893, being the date when the plaintiff first heard of said loss.

That the loss of the said cargo by perils insured against amounted to more than one-half of the whole value of said cargo as declared in said policy, and that the plaintiff is entitled to recover a total loss. The defendant company had due notice and proof of loss of said cargo April 29, 1893. The defendant company was bound by the terms of said policy to pay the plaintiff the sum of forty-eight thousand eight hundred dollars ($48,800) within thirty (30) days from said date, and the defendant company owes the plaintiff the said sum of money.

Second Count. And the plaintiff duly demanded said sum of the defendant company on May 29, 1893, and the said defendant company owes the plaintiff for interest to the date of the writ the sum of nine hundred and seventy-six dollars ($976).

THE WASHBURN & MOEN MANUFACTURING COMPANY,
By CARVER & BLODGETT, *Its Attorneys.*

Cargo. No. 200.

The Reliance Marine Insurance Company, Limited.

Washburn and Moen Mfg. Company, on account of whom it concerns,

In case of loss to be paid to said company, do make insurance and cause wire to be insured, lost or not lost, at and from Boston to Galveston *and/or* Velasco, upon all kinds of lawful goods and merchandises laden or to be laden on board the good schooner called the Benjamin Hale —— —— whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, -rom and immediately following the loading thereof on board
8 of the said vessel, at —— as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at ——as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued (premium included) at sum insured.

Touching the adventures and perils which the said assurers are contented to bear and take upon themselves in this voyage, subject as hereinafter provided, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the masters and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or — assigns, at and after the rate of, as indorsed, one and one-fourth per cent.

The assurers are to be entitled to premiums at their usual rate on all shipments reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the assurers.

And in case of loss, such loss to be paid in thirty days after proof

of loss, and proof of interest in the said — (the amount of the premium, if unpaid, being first deducted), but no partial loss
9 or particular average shall in any case be paid, unless amounting to five per cent., provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient toward fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said assurers shall nevertheless be answerable, subject as hereinafter provided, for the full extent of the sum insured by this policy, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed that the property be warranted by the assured free from charge, damage or loss, which may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the assurers. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of a blockade to be at liberty to proceed to an open port and there end the voyage.

And the assurers are contented, and do promise and bind themselves to the assured, their executors, administrators or assigns, for the true performance of the premises, for the amount herein insured.

In witness whereof, the undersigned, on behalf of the said Reliance Marine Insurance Company, Limited, has hereunto set his hand in New York, the fifteenth day of March, 1893.

10 MEMORANDUM.—It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and

cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy (except caused by actual contact of sea water with the articles damaged), occasioned by sea perils. In case of partial loss by sea, damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandises as far as practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$48,800. Forty-eight thousand eight hundred dollars.

HENRY DESPARD, *Attorney.*

This policy is not valid until countersigned by Edmund A. Poole, agent at Boston.

EDMUND A. POOLE, *Agent.*

Sum insured, $48,800. Premium, $610.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

11 (3.) *Claim for Jury.*

(Filed in State court Nov. 6, 1893.)

In the above action we claim a jury.

CARVER & BLODGETT, *Judges.*

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(4.) *Appearance for Defendant.*

(Filed in State court Nov. 16, 1893.)

In the above action we appear for defendant.

LOWELL, STIMSON & LOWELL,
709 *Exchange Building.*

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(5.) *Petition for Removal.*

(Filed in State court Nov. 24, 1893.)

Petition for removal of this cause to the United States circuit court for the district of Massachusetts.

To the honorable the justices of the superior court of the Commonwealth of Massachusetts for the county of Suffolk:

Your petitioner respectfully shows that it is the defendant in the above-entitled suit, and that it is a corporation duly established under the laws of the Kingdom of Great Britain and Ireland, and that it is a non-resident of the State in which said suit was brought, to wit, the said State of Massachusetts, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the said suit is of a civil nature at common law, to wit, an action of contract for the recovery of sums alleged to be due under a policy of marine insurance, executed the fifteenth day of March, A. D. 1893.

That the controversy in the said suit is wholly between a citizen of a State and a citizen of a foreign State, to wit, between
12 your said petitioner, who avers that it was at the time of the bringing of this suit, and still is, a citizen of the United Kingdom of Great Britain and Ireland, and the said plaintiff, who, as your petitioner avers, was then and still is a citizen of the State of Massachusetts.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to said circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States, in and for the district of Massachusetts, and it will ever pray.

RELIANCE MARINE INSURANCE COMPANY, LTD.,
p. p. HENRY DESPARD,
Attorney, Petitioner.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(Indorsement:) 29 Nov., '93. Pet'n accepted.

(6.) *Bond on Removal.*

(Filed in State court Nov. 24, 1893.)

Know all men by these presents, that The Reliance Marine Insurance Company, a corporation duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, as principal, and that Edmund A. Poole and William H. Lord, as sureties, are holden and stand firmly bound unto the Washburn & Moen Manufacturing Company, a corporation established under the laws of the Commonwealth of Massachusetts, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the said Washburn & Moen Manufacturing Company, its successors and assigns, we bind ourselves jointly and severally by these presents. Upon condition, nevertheless, that whereas the said Reliance Marine Insurance Company has petitioned the superior court of the Commonwealth of Massachusetts, in and for the county of Suffolk, for the removal of a certain cause therein pending, wherein the said Washburn & Moen Manufacturing Company is plaintiff, and
13 the said Reliance Marine Insurance Company is defendant, to the circuit court of the United States, in and for the district of Massachusetts (said cause being numbered 8273).

Now, if the said Reliance Marine Insurance Company shall enter in the said court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this sixteenth day of November, A. D. 1893.

RELIANCE MARINE INSURANCE CO., LTD.,
p. p. HENRY DESPARD, *Attorney.* [SEAL.]
EDMUND A. POOLE. [SEAL.]
WILLIAM H. LORD. [SEAL.]

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(Indorsement:) 29 Nov., '93. Bond accepted.

This cause, entered as aforesaid at the May term of this court, A. D. 1894, was thence continued to the October term, A. D. 1894, when the following amendment to declaration was filed and allowed by the court, the Honorable William L. Putnam, circuit judge, sitting.

Amendment to Declaration.

(Filed in circuit court Oct. 19, 1894.)

And now comes the plaintiff in the above-entitled action and asks to amend his declaration as filed in said case by adding to the copy

of said policy of insurance the further clauses hereto annexed, marked "A," which, being in the margin of said policy, were, through inadvertence, omitted.

THE PLAINTIFF,
By EUGENE P. CARVER,
Its Attorney.

Oct. 24, 1894. PUTNAM, J.: Amendment allowed.

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken, or in case
14 there be none, by the correspondent of the National Board of Marine Underwriters of New York.

Cargo on deck free from claims or loss by wet, breakage, leakage, or exposure.

The assurers not to be liable under this policy for more than $— by any one vessel, at one time, unless otherwise agreed upon at the time of indorsement.

Proof of loss to be authenticated by the agent of the assurers, if there be one at the place such proofs are taken.

Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation or by or from any officer, civil or military, or other person claiming to act in their name or under their authority, or in their behalf.

This policy to be deemed continuous, and to cover as above until discontinued by either party or giving the other — days' notice.

Free of particular average, but liable for absolute total loss of a part if amounting to five (5 %) per cent.

At the same term the following demurrer was filed:

Demurrer.

(Filed Oct. 25, 1894.)

And now comes the defendant in the above-entitled case, and, demurring to the plaintiff's declaration as amended, says that the said declaration and the matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have his action against the defendant, for that the first count in said declaration is double, repugnant, ambiguous and multifarious, in that it does not clearly state whether the plaintiff claims to recover of the defendant by reason of an absolute and actual total loss, or by reason of a constructive total loss of the goods insured; and also, for that if the plaintiff intends by said first count to recover against the defendant for a constructive total loss by reason of the loss of more than half of the whole
15 value of said cargo and of the abandonment thereof, as the plaintiff says in said first count, and as the defendant is advised and believes, then it appears by said first count, and by the terms of the policy set forth therein, that the plaintiff is not legally

liable for such constructive total loss of the cargo, insured or otherwise; and also, for that it appears by the policy set forth in said first count that the plaintiff is entitled to recover thereunder only for an actual total loss and destruction of all the goods insured, or for the actual total loss and destruction of a part of said goods, and neither such actual total loss and destruction of the whole, nor such actual total loss and destruction of a part, is properly averred in said first count.

And demurring to the second count in said declaration, the defendant says that the same is not sufficient in law, for that the interest claimed in said second count is due only upon the obligation declared on in said first count and is wholly dependent thereon; wherefore, unless the said first count is sustained the second falls with it.

Wherefore, for want of a sufficient declaration, the defendant prays judgment.

RELIANCE MARINE INS. CO.,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended for delay.

FRANCIS C. LOWELL.

Oct. 25, 1894.

This cause thereupon came on to be heard and was fully heard by the court upon the foregoing demurrer, the Honorable William L. Putnam, circuit judge, sitting.

On the first day of March, A. D. 1895, the opinion of the court was filed, and thereupon the demurrer was overruled, and the defendant was ordered to answer on or before the eleventh day of March, 1895.

On the ninth day of March the following answer was filed:

16 *Answer.*

(Filed March 9, 1895.)

And now comes the defendant, and for answer denies each and every allegation in the plaintiff's declaration contained.

And further answering, the defendant says that it is not informed if the policy of insurance was issued and executed as set out in the plaintiff's declaration, but it requires the plaintiff to prove the same; that it is not informed if the schooner Benjamin Hale, in the plaintiff's declaration mentioned, was proceeding on its voyage with the cargo insured on board, or if the said schooner struck a rock, but it requires the plaintiff to prove the same. The defendant denies that the said schooner filled with water and sank, and that the said cargo became totally lost by perils insured against, but avers, on the contrary, that a large part of the said cargo arrived at Velasco, its port

of destination. The defendant denies that the plaintiff duly abandoned the said cargo to the defendant at the date and in the manner in the plaintiff's declaration set forth. It denies that the loss of the said cargo by perils insured against amounted to more than one-half of the declared value of said cargo, and it denies that the plaintiff is entitled to recover a total loss of the same. It denies that it had due notice and proof of loss of said cargo on April 29, 1893. It denies that it was bound by the terms of the said policy to pay to the plaintiff the sum mentioned in the declaration at the time mentioned therein, and it denies that it owes the plaintiff the said sum of money. It is not informed if the plaintiff duly demanded the said sum of it, the defendant, on May 29, 1893, but requires the plaintiff to prove the same; and it denies that it owes the plaintiff nine hundred and seventy-six dollars, or any sum whatsoever, for interest or otherwise.

And further answering, the defendant says that by the terms of the said policy it was provided, among other things, that wire of all kinds was warranted by the defendant free from average unless general; and by the terms of the said policy, and at the request of the defendant in applying therefor, it was further provided that the wire insured should be free of particular average, that is to say, not insured against damage or partial loss; but that the defendant
17 should be liable for absolute total loss of a part, if such absolute total loss of a part amounted to five per cent. of the cargo insured. And the defendant says that in consideration of the insertion in the policy of the clause last mentioned, limiting the liability of the defendant, as aforesaid, the premium charged by the defendant to the plaintiff was materially reduced; the said reduction in the premium charged by the defendant being made to correspond with the diminished liability incurred by the defendant. Wherefore the defendant says that, by the terms of the said policy, it did not incur any liability for any injury or damage to the cargo of wire insured, unless there was an actual total loss of the same, or an actual total loss of a part, as aforesaid. And the defendant says that even if it be true, as set forth in the plaintiff's declaration, that the loss of the said cargo by perils insured against amounted at the time of said alleged abandonment to more than one-half of the declared value of said cargo, that is to say, if there was at that time what is known as a constructive total loss of the said cargo, yet that, by the terms of the said policy, the defendant is not liable for the said constructive total loss, but only for an actual total loss, as aforesaid. And the defendant denies that there was an actual total loss of said cargo; but affirms that a large part, to wit, more than half, of said cargo reached the port of destination; and avers that the damage suffered by the said cargo was in great part caused by the negligent treatment and exposure of the said cargo by the plaintiff, its agents and consignees; and the defendant says that it offered to the plaintiff to ascertain if there had been an actual total loss of a part of said cargo caused by perils insured against, amounting to five per cent. or more; and the defendant offered, upon the ascertainment thereof, if it should appear that there had been such an actual total loss of a

part, as aforesaid, to pay to the plaintiff for said actual total loss of a part, as aforesaid; but that the plaintiff has refused to permit the ascertainment of the facts aforesaid, wherefore the defendant has been and still is unable to ascertain if it owes anything to the plaintiff for an actual total loss of a part, as aforesaid, and in any case, the defendant says that no claim for such actual total loss of a part is made in the plaintiff's declaration and cannot be recov-
18 ered thereunder; wherefore the defendant says that *he* does not owe the plaintiff anything.

RELIANCE MARINE INSURANCE COMPANY,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

This cause was thence continued to this present May term, A. D. 1895, and issue having been joined, this cause is committed to a jury, sworn according to law to try the issue, the Honorable William L. Putnam, circuit judge, sitting. The said jury, after hearing all matters and things concerning the same, on the fourteenth day of June return the following verdict and special finding:

Verdict.

June 14, 1895.

The jury find for the plaintiff, and assess damages in the sum of twenty five hundred dollars.

SAMUEL G. DEXTER, *Foreman.*

Special Finding.

June 14, 1895.

The jury find that there was a constructive total loss.

SAMUEL G. DEXTER, *Foreman.*

On the second day of October, A. D. 1895, the following bill of exceptions was filed and allowed by the court:

Plaintiff's Bill of Exceptions.

(Filed and allowed Oct. 2, 1895.)

This is an action of contract on a policy of marine insurance. The action was commenced in the superior court in the county of Suffolk, Commonwealth of Massachusetts, in September, 1893, and removed upon defendant's petition to this court.

It is an action to recover for the total loss of a cargo of wire shipped on board the schooner Benjamin Hale, at the port of Bos-
19 ton, to be carried to the port of Velasco, a port in Texas.

At the trial of the case, the policy of insurance issued by the defendant company was admitted in evidence. A copy of the same is annexed hereto, marked "Exhibit 1."

At the trial of the case, the plaintiff introduced evidence tending to show that on March 29, 1893, it shipped at Boston a cargo of wire, of which it was the sole owner, on board of the schooner Benjamin Hale, and received from her master a bill of lading which was duly admitted in evidence, a copy of which is hereto annexed, marked "Exhibit 4."

A copy of the noted protest and also of the extended protest of the master and other officers of the schooner Benjamin Hale, dated April, 1893, is hereto annexed, marked "Exhibit 9," and were duly admitted to evidence.

There was evidence sufficient under the rulings of the court to warrant a jury in finding that there was a constructive total loss of the said cargo by perils insured against, provided the plaintiff could recover for a constructive total loss under the policy of insurance sued upon.

The plaintiff introduced further evidence as follows:

EDMUND A. POOLE of Boston, the agent of the defendant company since March, 1893, testified that he countersigned the insurance policy and delivered the same to the agent for the plaintiff. (A copy of which is hereto annexed marked "Exhibit 1.")

That he first heard of the loss in 1893; that he received an abandonment of the cargo to him by letter; that he had some conversation with Mr. Bates, the agent for the plaintiff, but does not remember whether it was about the loss or other business; that he received a certified copy of the protest on the schooner Benjamin Hale, a copy of the bill of lading and also of the invoice; does not remember that he called for any further proof of loss. He understood that a charter was made for the schooner Cactus to carry the cargo from Key West to Velasco; does not remember the conversation; had some talk with Mr. Randall but does not remember that it was in relation to the charter of the schooner Cactus. It might have been before the charter was made or it might have been after; that a person by the name of Mereno was the agent of the National Board of Marine Underwriters of New York, of which association the defendant company was a member. He presumes this association acted in behalf of the underwriters on vessel, freight and cargo. Doesn't remember having any conversation with Captain Hall or Mr. Gore, or the owners of the Benjamin Hale, with relation to forwarding the cargo from Key West to Velasco. Doesn't think the Reliance Company took charge of the cargo at Velasco. Doesn't think they advanced any money for that purpose. He did not.

On cross-examination he states that he declined the abandonment by letter dated "Boston, May 1, 1893," and put in as evidence in the same, marked "Exhibit 6;" that the defendant company never received any of the proceeds of the sale of this cargo at Velasco after its sale.

JOHN HALL, master of the schooner Benjamin Hale, testified that he was fifty-three years old and master mariner, and had been to sea since he was sixteen years of age in all kinds of vessels; had

been a master mariner twenty-eight years. He made a contract of charter-party with the Washburn & Moen Manufacturing Company to carry a cargo of wire from Boston to Velasco. A copy of this charter-party is hereto annexed, marked "Exhibit 7;" that he signed the bill of lading, a copy of which is hereto annexed, marked "Exhibit 4."

The schooner Benjamin Hale, in a good seaworthy condition, sailed from Boston on the thirty-first day of March, 1893; that he encountered only the ordinary perils of the sea until the fifteenth day of April, when his schooner ran ashore on Bahama banks, and he threw overboard about two hundred reels of barbed wire. The result of throwing this wire overboard was that the schooner floated and proceeded on her voyage.

On April 19, 1893, at 10.30 p. m., the schooner Benjamin Hale again ran ashore on Bird key near the Dry Tortugas. By reason of the vessel running ashore she filled with water. The pumps were sounded and thirteen feet of water was found in the stern of the vessel. The vessel was higher at the bow than at the stern; that there was not as much wire loaded in the bow as in the stern; that the crew of the schooner used the pumps, but were unable
21 to pump the water out that was in her; that a wrecking crew of four men from a wrecking schooner came on board Friday, April 21. This schooner had no appliances or steam pumps.

That on April 22 he went on board the packet which runs to Key West and stops at Dry Tortugas, and arrived in the Packet at Key West on Saturday, April 23, in the evening.

On April 24 he sent a telegram to the Washburn & Moen Manufacturing Company, a copy of which telegram was admitted in evidence and marked "Exhibit 8." At the time that he sent the telegram he thought the schooner Benjamin Hale and cargo were a total loss. He judged of the same from his experience as shipmaster, and he also consulted with another shipmaster, who thought the same. On April 24 he got some wreckers to go to the vessel, and took some pumps with them to try and save the vessel and cargo; that he went back to the place where the schooner Benjamin Hale lay in the Packet, and arrived there on Tuesday, April 25, at 11 a. m. The wreckers that were sent from Key West arrived at about the same time. All the wreckers went to work on the vessel and she was floated on April 29 at 2 p. m.; stood into Tortugas at 3 p. m.; from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. When she got off she was nearly all or partly pumped out. About two hundred bales of wire were thrown overboard in order to make room for the wrecking pumps; after she was floated the schooner could not be kept free of water until a wrecking steamer came to her assistance and towed her to Key West, where she arrived on Thursday, May 4, at 12 m.; thinks about one-half of cargo was discharged on the reef, of which he thinks about thirteen hundred reels were dry; that the balance of the wire was very wet, the most of it having been immersed wholly in salt water all this time.

The noted protest and extended protest were admitted in evi-

dence without objection and marked "Exhibit 9." The said copies of the protests were at once forwarded by him to the Washburn & Moen Manufacturing Company, he is quite sure, at their request. He does not remember the date. He saw the vessel and cargo of wire while it was being discharged. The discharge was completed on Wednesday, May 10, at 8 a. m. During all of this time
22 the hold of the schooner Benjamin Hale was more or less filled with water. After the cargo was discharged, the dry cargo was placed in the warehouse, and the wet cargo was placed on the wharf, where it was exposed to the atmosphere. He did not examine the wire very closely. The galvanized wire looked well, and a portion of the other was rusted considerable. He did not notice any white powder on the galvanized, but it was not looking as bright as that which had not been wet.

He left Key West on Saturday, June 10, and at that time there had been proceedings taken by the salvors; that the vessel and cargo had been libelled by them in the United States admiralty court; that while at Key West he met the underwriters' agent, Captain Hanna, of New York, and also the local underwriter's agent, Moreno. He received a request from both of these parties to forward the wire to Velasco. He wished to abandon the cargo at Key West and not ship it forward, as he thought it was better for all concerned. He could not get a vessel to take the cargo from Velasco to Key West for ordinary freight, or for the freight that he was to receive under his charter-party; that when he left Key West Captain Hanna had gone and the cargo was still there, and no vessel had been chartered to carry the cargo forward to Velasco. He never paid any salvage on the cargo and did not employ counsel to defend the salvage case against the cargo. He went from Key West to Boston and afterwards went to the hospital, but he made no negotiations in Boston in regard to chartering any vessel to carry the wire to Velasco, and did not authorize any one to do so for him; that he signed the charter-party, but did so at the request of John S. Emery & Company. They consummated the charter that he attempted to negotiate at Key West. (This charter is admitted in evidence and marked "Exhibit 10.") It was brought to him at Marshfield by his brother.

He did not send a copy of this charter-party to the plaintiff, and the plaintiff did not request him to forward the cargo to Velasco. Captain Hanna requested to have it forwarded to Velasco; he Captain Hall, then wished to abandon it; that at the time he signed the charter-party he had abandoned the schooner Benjamin Hale; after the vessel was seized by the marshal, neither he nor any of his owners, so far as he knows, exercised any dominion over her
23 he said that the costs of repairs, together with other expenses, would be more than she was worth. He did not receive any bill of lading signed by the master of the schooner Cactus and did not undertake to deliver the cargo of the Benjamin Hale at Velasco; he authorized Taylor & Curry to charter the Cactus if they could. During the time that the cargo was in Key West, and he was there, it was pleasant most of the time. There is a claim

for general average against the cargo in behalf of the owners of the schooner Benjamin Hale, but no adjustment of the same has yet been made.

The agents of the vessel, Taylor & Curry, paid for the discharge of the cargo at Key West.

On cross-examination he testified that no part of the cargo was stored on deck. It was all in the hold; that the running ashore on the Bahamas, April 15, was in no way connected with the stranding on Tortugas the night of April 18. During the intervening time the vessel had not leaked more than ordinarily. They began taking out dry cargo April 22, and went on discharging that cargo from day to day. He thinks about two thirds of it was taken out up to the time that they got the schooner off, and that was landed at Tortugas, and the wreckers had taken it to Key West. That which was transhipped in that way at Tortugas and so sent to Key West, not on the Benjamin Hale, was mostly dry. The underwriters did not wish him to take the cargo off at Tortugas, but to go on to Key West with what cargo there was in the vessel. He received instructions in that respect from Mr. Moreno at Key West, who represented the underwriters on the vessel as well as the cargo. There was very little insurance on the vessel. The underwriters took the risk of taking the vessel to Key West without discharging it. He thinks Moreno telegraphed Poole, or Taylor & Curry,—don't know which, but think it was Moreno; he is quite positive it was Moreno telegraphed to know, if he should take the vessel to Key West with the cargo as she was, if they would assume the risk. Has no copy of the telegram. Does not know whom he telegraphed to. It was not blowing a gale of wind while the vessel was ashore, it was blowing fresh. There were probably eight or nine feet of water in the vessel at Key West, perhaps less. Her hold was thirteen feet.

He also testified that he thought Exhibit 12 was a memo-
24 randum of cargo discharged; that it was signed by him at the time, and that he supposes it must be correct. He further testified that the abbreviation dam. means damages; gal. means galvanized, and tel. means telegraph wire.

The witness also testified that Exhibit 11 was a bill for the storage of the cargo saved at Key West, and that it was signed by him. It was offered in evidence merely to show the exact amount of wire and staples, and so on, that were saved ashore at Key West on the 18th of May, 1893.

THEODORE W. GORE testified that he is, and was in 1893, an adjuster of marine averages in Boston; that he acted in behalf of Mr. Walton Hall, one of the owners of the schooner Benjamin Hale, in either May or June, 1893. He did not see Captain John Hall, but saw his brother Walton Hall; that he had an interview with Mr. Poole, representing the Reliance Marine Insurance Company, with regard to the cargo to be carried from Key West to Velasco; that he advised Mr. Poole to have nothing to do with the cargo, to leave it alone.

DANIEL N. BATES testified that he resides in Worcester, Mass.; has charge of the freight and insurance of the Washburn & Moen Manufacturing Company, and has done so for the last eight years. In 1893 he was in the same position that he holds today; that he attended to the insurance of this cargo for the company, and that he remembers the shipment of the cargo and the shipment of wire of the schooner Benjamin Hale. The premium on the same amounted to six hundred and ten dollars and was paid by the plaintiff company to the Reliance Marine Insurance Company; that the first his company heard in relation to any injury or disaster to the schooner Benjamin Hale, or her cargo, was a telegram from the captain of the schooner Benjamin Hale. The telegram marked "Exhibit 8" is admitted as evidence in this case.

He thinks it was on Monday, April 24, that he came to Boston, either that day or the next, and saw a gentleman by the name of Ogilby who was connected with Johnson & Higgins, insurance agents; that he had a conversation with him in regard to what the plaintiff should do.

As a result of that conversation he called on Mr. Poole, the defendant's agent, at his office, told him what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters. This was on either Monday, Tuesday or Wednesday. Mr. Poole said that he did not know anything about it, but that he had seen something in the papers, but as yet nothing official; that on a later date he consulted counsel in the case, and as a result of that interview he dictated a letter to send to Mr. Poole, in which he enclosed certain papers, among which was the bill of lading, a copy of the invoice and the protest, which had been received in the meanwhile. He wrote this letter because it was stated to him by his counsel that there was something in the Boston policy which required an abandonment in writing, and he did not have the policy in suit with him at the time. After the schooner Benjamin Hale left, he discovered that three hundred and ninety-two kegs of staples that were contained in the bill of lading were not shipped on board of her, as it did not arrive until too late. After the abandonment of the cargo by the plaintiff, it did not exercise any right of ownership over the cargo of wire, and it has never received any money on account of the sale of the said cargo. The Washburn & Moen Manufacturing Company received a letter, which is hereto annexed, marked "Exhibit 13," and which is admitted as evidence in this case.

The agent of the Washburn & Moen Manufacturing Company in Houston was instructed that the plaintiff had abandoned the cargo to the defendant company, and that he was not to receive it. The plaintiff had never had anything to do with the cargo from the time that they made the abandonment until the present time, nor did they assume any direction or control over it. He saw samples of the cargo after it arrived at Velasco. The samples did not look like wire, but looked like a mass of rust. He saw the cargo of barbed wire when it was put on board of the schooner Benjamin Hale. It was slipped down a plank and dropped in the hold, and

was then carried away by longshoremen and stowed; that barbed wire is reeled by machinery.

On cross-examination he states that these goods were consigned to the plaintiff and were not sold; that the company distrib-
26 uted them from Velasco to all parts of Texas; that Texas was a good market for wire at the period at which the wire was sold. The rusty lot of wire that he saw consisted of a sample cut from fifteen bundles of barbed wire; some of it was painted and some galvanized. He thinks he saw it about the time it was landed at Velasco, but cannot fix the exact date. This was in the autumn of 1893. It was sent him by the plaintiff's agent, George H. Cragin.

WILLIAM E. RICE, of Worcester, Mass., testified that he is, and was in 1893, president of the Washburn & Moen Manufacturing Company, the plaintiffs in this case; that he was sixty-one years of age; had been connected with the Washburn & Moen Manufacturing Company for forty years; that it is engaged in the manufacturing of all kinds of wire, and was the owner of the cargo shipped on schooner Benjamin Hale in 1893; that since April, 1893, his company has never exercised any action of ownership over the cargo of wire loaded on board the schooner Benjamin Hale. On Oct. 28, 1893, a bill of lading was sent by the Houston agency, which he at once forwarded to his counsel in Boston. The plaintiff has never received any money from any source on account of this cargo of barbed wire. There is no market for barbed wire at Key West, but Velasco, Texas, is a good place to sell all kinds of barbed wire. Galvanized wire will stand exposure to good or wet weather better than painted wire. It will also stand exposure to sea water better; that the total number of reels of barbed wire on the schooner Benjamin Hale was thirteen thousand and fifty-one. Eleven thousand seven hundred and seventy-five were galvanized barbed wire, and twelve hundred and seventy-six reels were painted barbed wire. The price of galvanized wire was then three cents per pound, and the painted two and a half cents per pound, put free on board the cars at Worcester.

Deposition of GEORGE A. CRAGIN, taken in Houston, Texas, on May 15, 1895, which is as follows:

Q. 1. What is your name, age, and place of residence?

A. George A. Cragin; age, thirty-one; residence, Houston, Texas.

Q. 2. What business are you engaged in, and for whom?

A. I am the representative of the Washburn & Moen
27 Manufacturing Company, manufacturers of wire. My headquarters are in Houston

Q. 3. What experience have you had in handling wire goods, if any, and what kind of wire goods have you had experience in handling?

A. I have had considerable experience, extending through a

period of fourteen years, in all kinds of wire, and many kinds of goods made of wire.

Q. 4. What has been the extent of your experience in this line of business, and where have you been engaged in business besides Houston, Texas?

A. I was in the same line of business in Chicago, and for about five years in San Francisco.

Q. 5. Do you know the market value of barbed wire, wire of various classes, smooth wire, rope wire, galvanized lines, annealed wire, hay ties, insulated wire and staples, in the markets of Velasco, Houston and Galveston, Texas, in August and September, 1893?

A. I do.

Q. 6. Did you examine a cargo of goods last inquired about, discharged by the schooner Cactus at Velasco?

A. I did.

Q. 7. To whom was the cargo consigned?

A. Consigned to the Washburn & Moen Manufacturing Company at Velasco.

Q. 8. When did you first see the cargo and examine it, where was it at that time, and in what condition did you find it?

A. I examined it a short time after it arrived on board the schooner Cactus. The fact of its being on the schooner prevented a very thorough examination, as only a very small portion of the cargo was exposed to view. I found the cargo that I examined to be in a decidedly damaged condition.

Q. 9. Did you make any subsequent examination of it, and if so, where and when?

A. I made several subsequent examinations after the cargo had been discharged in Velasco.

Q. 10. What was the character of the examination you made, and what was the extent?

A. I went over the cargo very carefully, and examined all of it that could be seen from any point of view. The cargo was piled in such a manner that it could not be entirely examined.

Q. 11. What do you mean by "could not be entirely examined"?

A. Large portions of the cargo consisted of barbed wire.
28 This, for instance, was six reels high, and in one body, so that a large part of the under reels could not be seen at all. I was not in Velasco when the cargo was being discharged.

Q. 12. What did you, as general representative of the Washburn & Moen Manufacturing Company, have to do with the discharging of the cargo?

A. Nothing whatever, as I had refused to receive same as representative of the company.

Q. 13. From your examination made at the time indicated above, of what did the cargo consist?

A. It consisted of one reel of wire rope, five reels of insulated wire, fifteen barrels of clothes lines, about a thousand bundles of plain wire, smooth annealed and galvanized, about two hundred and fifty kegs of staples, about five hundred bundles of hay ties, and from twelve thousand to thirteen thousand reels of barbed wire.

The last-mentioned items were as near as I could get from a careful estimate.

Q. 14. In what condition did your examination disclose the cargo generally to be?

A. The bulk of the cargo was seriously damaged.

Q. 15. Please state what you estimate the per cent. of the damage to the various items of the cargo in detail to be?

A. I found the reel of rope and clothes lines and staples, and some thirty or forty bundles of smooth wire to be in good condition, having sustained no damage, the insulated wire damaged from twenty-five to thirty per cent.; the hay ties were slightly damaged to the extent of about ten or fifteen per cent.; the balance of the smooth wire, or the larger portion thereof, was seriously damaged, some of it being utterly worthless and some of it being but slightly damaged. I estimated the damage to the entire lot of this smooth wire, exclusive of the thirty or forty bundles above referred to as being in good condition, at from sixty to sixty-five per cent. The larger portion of the barbed wire consisted of galvanized barbed wire, which was seriously damaged. I estimated the damage to this galvanized barbed wire at sixty-five per cent. of its original cost. The remainder of the barbed wire was painted barbed wire, which was so damaged as to render it worthless.

Q. 16. What do you estimate the damage in percentage of the total cargo to be?

A. At least seventy per cent.

29 Q. 17. Do you know the date that the cargo was discharged from the Cactus?

A. I cannot give the exact date, but it was about Aug. 10, 1893.

Q. 18. From your experience, what effect will the August and September weather ordinarily have upon wire of that character when it is exposed for two months, and when it was in good condition at the time it was exposed, and free from damage?

A. Ordinary weather at that season of the year would have practically no effect on galvanized and painted barbed wire, or smooth galvanized wire.

Q. 19. When the cargo was discharged where was it placed, and what part of it, if any, was exposed, and what part, if any, was under cover?

A. The galvanized and painted barbed wire and the smooth galvanized wire was placed on a rudely constructed platform resting on the ground, and was entirely exposed to the weather. The remainder of the cargo was placed in the warehouse on the docks at Velasco, and was entirely protected from the weather.

Q. 20. What do you estimate the market value of the cargo in money, in the market of Velasco, at the time it was discharged by the schooner Cactus, in the condition it was then in in Velasco?

A. It really had no market value.

Q. 21. On account of what cause?

A. For the reason that wire in the condition that this cargo was in must be sold for just what the prospective purchaser who examines such wire will give for it. It was badly damaged, and there is

no way of arriving at the market value of this kind of goods in such condition; there is no fixed relation between their intrinsic value and their market value.

Q. 22. Was there any part of the cargo discharged by the Cactus and examined by you which had no market value as wire, and if so, what part of it and how much?

A. Yes, sir; all the painted barbed wire, and a considerable portion of the plain wire, annealed and galvanized wire.

Q. 23. How long have you been representing the Washburn & Moen Manufacturing Company at Houston, Texas, as their general agent?

A. Since Feb. 1, 1893.

Q. 24. Do you recollect what the condition of the weather was at Velasco from the time the cargo was discharged until it was sold?

A. During that time I visited Velasco upon several occasions, and the weather was clear and fine upon each of these occasions. I could not say what was the condition of the weather the remainder of the time.

Q. 25. What is the distance from Velasco to Houston?

A. Sixty miles.

Q. 26. Does that represent by rail or a direct route?

A. By rail, sixty miles, and by direct route a little less.

Cross-examination:

X Q. 27. Where is the factory, the Washburn & Moen Manufacturing Company, located?

A. They are located at Worcester, Mass.

X Q. 28. Where was this wire made?

A. At Worcester, Mass.

X Q. 29. Was it ordered by you as agent, or was it made by the factory and sent to you as general agent?

A. I order all the stock that is carried at Houston or sold from this point. This particular cargo was ordered by me for stock.

X Q. 30. Was it shipped originally by the Cactus?

A. No, sir.

X Q. 31. What vessel was it shipped on?

A. The Benjamin Hale.

X Q. 32. Where did the Cactus receive it?

A. At Key West.

X Q. 33. Was that by your order?

A. No, sir.

X Q. 34. How did that come?

A. I do not know.

X Q. 35. When were you first notified that the cargo had reached Velasco, and how, if you know?

A. I received a notification by mail from the commander of the Cactus.

X Q. 36. What did you do when you received that notice?

A. Paid no attention to it, so far as the commander of the Cactus was concerned, but subsequently went to Velasco and examined the

cargo through the courtesy of the captain, and reported on its condition to the home office.

X Q. 37. Have you got a copy of that report?

A. I cannot say.

X Q. 38. Can you ascertain by investigation whether or not you have a copy of that report?

A. Yes, sir.

X Q. 39. I would ask, if you have a copy of that report with you, you would append it to this answer and mark it for identification, and make it a part of the answer. (*Attached, marked* "Exhibit B.")

X Q. 40. Have you the original report in your possession?

A. No, sir.

X Q. 41. Where is it?

A. I do not know.

X Q. 42. What became of it?

A. I sent it to the home office.

X Q. 43. Is it not now in your possession or accessible to you?

A. No, sir.

X Q. 44. Did you receive an answer from the home office when you made that report, instructing you what to do with this cargo as agent of the company?

A. Yes, sir.

X Q. 45. Was that answer in writing?

A. It was.

X Q. 46. Have you got that answer in your possession?

A. I do not know.

X Q. 47. Can you know by examining your papers?

A. Yes, sir.

X Q. 48. I now request that you append the original answer, if in your possession, from your company, annex it, marking it for identification and making it a part of your answer. (*Attached, marked* "Exhibit C.")

X Q. 49. What did you do when you received that answer from your home company?

A. I did nothing with it whatever.

X Q. 50. When you received instructions from the home company, whatever they were, with reference to this cargo, what action did you take on the instruction?

A. I complied with them and took no action whatever.

X Q. 51. Were your instructions from the company to take no action whatever?

A. My remembrance of the instructions is that I was to take no action in the matter.

X Q. 52. And this you obeyed?

A. I did.

X Q. 53. Who was the owner of that cargo?

A. Washburn & Moen Manufacturing Company owned the cargo of wire when it was loaded at Boston.

X Q. 54. You state that it was consigned to you for stock?

A. It was consigned to their order, to be received by me as their agent.

32 X Q. 55. What disposition were you to make of it?

A. Sell it.

X Q. 56. Sell it from where?

A. From Velasco or Houston.

X Q. 57. What sort of a market is Velasco for wire in quantities of that size, the size of this cargo?

A. There is practically no difference between Velasco and Houston, it's simply a mere rate of freight. The only difference would be the difference in the rate of freight from Velasco to Houston and to some points the rate from Velasco would be the same as from Houston.

X Q. 58. What facilities had they in Velasco, in August and September 1893, for receiving and storing the cargo, as much as that brought in on the Cactus, if it is within your knowledge?

A. The facilities for handling a large cargo of that kind are excellent. They had storage capacity for all or a good portion of it but this storage was being used to a large extent in the handling of other and more perishable freight.

X Q. 59. Did that monopolize the space and prevent the possibility of storing a cargo as large as that of the Cactus?

A. All of the goods on the Cactus, subject to damage from the elements, were placed in a well-protected enclosure; the balance were placed in the open air and were not protected from the elements or weather.

X Q. 60. At whose instance was this cargo stored, if you know and who made arrangements for the storage?

A. I do not know.

X Q. 61. Did you bid on that cargo yourself for your company?

A. No, sir.

X Q. 62. Did you procure any person to bid?

A. No, sir.

X Q. 63. Were you present at the sale?

A. No, sir.

X Q. 64. Of your own personal knowledge, you do not know what the cargo brought, nor how many bidders were present at the sale?

A. No, sir.

X Q. 65. Did you make any effort, as agent of the Washburn & Moen Manufacturing Company, to protect that cargo and the owner of that cargo from loss at the time of its arrival in Velasco?

A. No, sir.

X Q. 66. What was the value of that cargo if in good order after delivery at Velasco?

A. In quantity originally shipped, about forty-eight thousand dollars.

33 X Q. 67. Did you receive a bill of lading and invoice for that cargo as agent of the company?

A. I received a bill of lading and a memorandum invoice. In explanation of that I state that the company does not bill any goods

consigned to this agency in dollars and cents, simply in quantity and weight.

X Q. 68. Did you compare the memorandum invoice that you received from your company with the memorandum you received from Velasco?

A. I did not.

X Q. 69. You were present at the time of the testimony of Mr. Blum before Mr. Houk in Galveston, and also at the taking of the testimony of Mr. Cortes, before Mr. Tackaberry, and heard the questions propounded to them and the answers which they gave?

A. Yes, sir; I was.

Direct examination resumed:

Q. 70. In answer to the question on cross-examination you stated that you took no action with reference to the cargo of the Cactus when it landed at Velasco, or afterwards, in the interest of the company you represent. Explain why you took no such action.

A. I did nothing myself, so far as the Cactus or her commander was concerned, but as I have already stated, I did subsequently make several examinations of this cargo.

Q. 71. Did you know anything with reference to abandonment of the cargo by the company before it reached Velasco?

A. As I remember, I was informed of an abandonment.

Q. 72. In acting as you did in reference to the cargo, after it arrived at Velasco, what influence, if any, did your knowledge of the abandonment have upon your conduct in the matter?

A. None whatever. I sought and obtained instructions and carried them out.

Q. 73. Then what was influencing you in the matter?

A. The fact of this cargo of wire arriving in a vessel other than the one in which it originally left Boston prompted me to seek instructions in the premises, upon which I acted.

84 EXHIBIT A.

VELASCO 14. 10.30 A. 7, 14, 1893.

Washburn-Moen Mfg. Co., Ho.:

Schooner Cactus here, cargo wire consigned to you now ready to discharge.

L. S. WILEY.

EXHIBIT B.

VELASCO, *July 15th*, 1893.

D. N. Bates, care Washburn & Moen Mfg. Co., Worcester, Mass.:

Have examined Cactus cargo, emerald and staples all right, galvanized embattle badly damaged, painted worthless. Captain demands we accept immediately, reported ready discharge yesterday, fifty dollars daily demurrage after five days. Two hundred dollars Key West demurrage freight at two and a quarter gross ton and unloading charges against the cargo. Telegraph here definite instructions quick.

GEO. A. CRAGIN, *Ag't.*

Paid.

EXHIBIT C.

WORCESTER, MASS., 7, 19, 1893.

Geo. A. Cragin, agent W. & M. Mfg. Co., Ho.:

We abandoned cargo at Key West and must contin-e abandonment under no circumstances agree receive cargo whenever wherever cargo discharged. You must have thoroughly competent expert examine so he can be witness for us. We have nothing to do Cactus captain sailing under insurance instructions.

WASHBURN & MOEN MFG. CO.

The plaintiff then offered as evidence a certified copy of the judgment and other proceedings in the cause of salvage against the schooner Benjamin Hale, said suit having been brought in the United States district court for the southern district of Florida, it being agreed that the libels and other papers should be admitted as evidence of the facts contained therein as though the same was taken by depositions of the parties or by other formal proof; same following, and marked "Exhibit 15."

35 EXHIBIT 15.

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND & JAMES ST. CLAIR ET AL.
v.
THE AM. SCHR. "BENJAMIN HALE" & CARGO. } Salvage.

Be it remembered that on the sixth day of May, A. D. 1893, came Reuben Ireland *et al.* by their proctor, W. C. Maloney, Esq., and filed with the clerk of the said court, their libel against the Sch. Benjamin Hale, her tackle, apparel, furniture and cargo, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND ET AL.
v.
SCHR. BENJAMIN HALE AND CARGO.

To the Honorable Jas. W. Locke, judge of the district court of the United States in and for the southern district of Florida:

The libel of Reuben Ireland, master of the steam wrecking tug Clyde, of the burden of 48 tons, and a crew of nine men, who libels for himself, his owners and crew, against The American Schr. Benjamin Hale, her tackle, apparel, furniture and cargo, consisting of 10,443 bundles of barbed-wire fencing, now lying and being in the port and harbor of Key West, and within the jurisdiction of this

honorable court, and against all persons intervening for their interest therein, in a cause of salvage, civil and maritime, alleges as follows:

First. The libellant says that on his arrival at this port of Key West on Sunday, the 30th day of April, he learned that two
36 (2) vessels were ashore at Tortugas, he immediately steamed out of port at 6.30 a. m. next morning. Arrived alongside the Schr. Benjamin Hale. He found the said schooner in the possession of salvors who had taken out a small portion of her cargo and had floated her and was anchored in six fathoms of water.

Second. The salvors, through wrecking master, Jas. St. Clair, requested libellant to come alongside immediately as the schooner was in a sinking condition and that they were about to put her back upon the reef; that she had about eight feet of water in her hold.

Third. The tug Clyde was immediately put alongside the said schooner, and her wrecking pump's suction was put in the schooner's hold and pumps started, then steam was furnished from the tug's boiler to a pump already on board the schooner which had been placed there by original salvors and where boiler was useless, and pumped until ten o'clock a. m. when the boiler running another pump, called the centrifugal, belonging to original salvors having been put in order with the assistance of the tug's engineer was put to work and the three pumps working together succeeded in freeing the schooner of water at 1.10 p. m.

Fourth. Libellants then hove up anchor and took the schooner in tow with the Cora astern of her, the schooner having no rudder hung, and took her into Tortugas harbor and placed her alongside the dock—again started pumps and kept the schooner free.

Fifth. On Tuesday morning sent a submarine diver under the schooner who worked all day Tuesday, and the following day, Wednesday, until about 11 o'clock a. m., making such temporary repairs as to enable the libellant to tow the schooner up to this port.

Sixth. On Wednesday at 6.30 p. m. got under way with schooner in tow, her rudder having been fixed, and started for Key West, and about 9 o'clock p. m., the boiler of the steam pump, already mentioned as being useless (having been temporarily repaired while at Tortugas) blew a plug out the tube and was again rendered useless—the schooner being anchored at the time for the purpose of ascertaining if the boiler aforesaid could be relied upon for the purpose of furnishing steam for the pump. The tug again connected her pipes with the pump and using her own pump by inserting
37 its suction into the schooner's hold and succeeded in freeing the schooner of water at about daylight Thursday morning.

Seventh. At daylight the weather being fine with light westerly winds, again started for Key West, and when near Rebecca shoal again placed the tug alongside the schooner and again freed her from water, and then proceeded until when off Boca Grande again put the tug alongside and again freed the sch. from water, again proceeded for Key West where we arrived at 12 o'clock Friday night.

Eighth. That during the passage from Tortugas to Key West the original salvors were running the centrifugal pump and two hand pumps on board the schooner and they rendered such assistance during the entire service as they were able to render.

Ninth. Libellants allege that they have saved the said schooner from total loss and the cargo on board from the expense and labor of having to be lightered to this port; that they are still employed working at the said schooner without any assistance from the original salvors and will be so employed until the said schooner is discharged.

Tenth. That they are unable to form any idea of the value of the said schooner or of her cargo.

Wherefore, the libellants pray that process in due form of law may issue against the said schooner and her cargo; that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree to them a reasonable and proper salvage according to the merits of their service, and that the said vessel and cargo may be condemned and sold if necessary to pay the said salvage, with the costs, charges and expenses, and for such other and further relief as in law and justice they may be entitled to receive.

REUBEN IRELAND, *Capt.*
W. C. MALONEY, *Proctor.*

Sworn to and subscribed before me this 6th day of May, A. D. 1895.

CHAS. J. CURRY, *N. P.*

Whereupon the following order was made:

38 Ordered that attachment and motion issue as prayed, returnable Wednesday, May 17, 1893, at 10.30 a. m.
May 6, 1893.

JAS. W. LOCKE, *Judge.*

Whereupon attachment was issued to the marshal of the said district commanding him forthwith to seize and take into his custody the said Amer. Schr. Benjamin Hale and cargo wherever found in his precinct, and the same to safely keep until further order of this court, which attachment was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office.

Also monition was issued to the said marshal commanding him forthwith to cite and admonish whomsoever having or pretending to have any right, title, claim or interest in or to the said Amer. Schr. Benjamin Hale and cargo to be before an admiralty session of the said court at the court-rooms in Key West on the 17th day of May, A. D. 1893, at *01* o'clock a. m. to answer the said libel and to show cause, if any they have, why decree should not be pronounced as prayed, which monition was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office.

And afterwards, to wit, on the tenth day of May, A. D. 1893, came James St. Clair *et al.* by their proctor, G. Bowne Patterson, Esq., and filed with the clerk of the said court their libel against the said Am. Schr. Benjamin Hale, her tackle, apparel, furniture and cargo, in the words and figures following, to wit:—

SOUTHERN DISTRICT OF FLORIDA, }
In Admiralty. }

To the Honorable Jas. W. Locke, judge of the district court of the United States in and for the southern district of Florida:

The libel of James St. Clair, master of the licensed wrecking Schr. Nonpareil, of the burthen of 42 tons and a crew of 12 men; of William H. Shaw, master of the licensed wrecking schooner Foam of the burthen of 16 tons and a crew of nine men; of Thomas B. Sweeting, master of the licensed wrecking Schr. Magnolia of the burthen of 44 tons and a crew of 11 men; of William Blatch-
39 ford, master of the licensed wrecking Schr. Golden Hind of the burthen of 70 tons and a crew of 9 men; of Thomas Pent, master of the licensed wrecking Schr. Cora of the burthen of 88 tons and a crew of 14 men, who libel for themselves, owners and crews, and for all others interested with them, against The American Schooner Benjamin Hale, her tackle, apparel, furniture and cargo, now lying and being in the port and harbor of Key West, and within the jurisdiction of this honorable court, and against all persons intervening for their interest therein — a cause of salvage civil and maritime, alleges as follows:

First. Libellant St. Clair says that on Friday, April 21st, 1893, while on his way with Schr. Nonpareil to Tortugas he saw a vessel ashore on the Bird Key shoal, immediately ran for her and upon boarding her at about 12.30 p. m. found the master and second mate on board, the crew having left her and were ashore at Tortugas, the vessel was partly stripped, and most of her stores and materials had been taken ashore at Tortugas; learned that the master and all of the crew had abandoned her, and that the master and the second mate had returned to her upon the approach of the Nonpareil; that she was the schooner Benjamin Hale of Newburyport from Boston bound to Velasco, Texas, with a cargo of barbed and other wire; that she went ashore the Tuesday previous, and that before going ashore she drew about fifteen and one-half feet of water, and that she was then bilged.

Second. The schooner lay ashore on Bird Key shoal, heading about west ½ south; offered his services to the master and they were accepted. The sea was so rough that it was impossible to do anything with the vessel at that time; went into the harbor of Tortugas taking the captain with him; found the schooner Foam of the Sea at Tortugas and formed a consort with her, and on the next morning at early daylight the libellant in his schooner Nonpareil again went to the wreck. The schooner Foam of the Sea took on board the materials and stores which had been taken from the wreck to Tortugas by the wreck's crew, and with the captain and

crew of the wreck on board proceeded for Key West; libellant, St. Clair, on boarding the wreck, opened the hatches and sounded the pumps and found she had 12½ feet of water in her hold;
40 manned the pumps with the crew of the Nonpareil and after pumping one hour could not lower the water, and the pumps throwing sand, concluded that the vessel was bilged; found the vessel's rudder unshipped and hanging, and the rudder casing stove in, a heavy swell rolling under the vessel's stern at the time. As soon as the sea moderated at about 2 p. m. at high water, libellant St. Clair sounded around the vessel and found under her stem 15½ feet at her fore chain, at her main chain 15 feet, at her mizzen chain 15½ feet, and at her stern 18½ feet, and the water gradually deepening from her stern out; put all hands of the crew of the Nonpareil to work stripping the vessel of her sails and running rigging, then discharging cargo from the vessel's hold on board the Nonpareil, and by 8 o'clock p. m. had the Nonpareil loaded with 300 rolls of wire, and with the vessel's sails and rigging went to Tortugas and discharged the same.

Third. The next morning, Sunday, the 23rd of April, at early daylight the Nonpareil returned to the wreck, while the Nonpareil's crew were taking out cargo, libellant St. Clair went in a small boat around the wreck making a thorough examination of her condition, and found two butts opened on the starboard side, at the main rigging, and the end of one of her planks under her stern splintered, the crew being employed all day discharging cargo on board the Nonpareil; knocked off at night.

Fourth. The next morning, Monday, April 24th, after libellant, St. Clair, had caulked up such leaks as could be gotten at, at 6 o'clock a. m., he put all hands of the crew of the Nonpareil at the pumps of the wreck and pumped until 2.45 p. m., reducing the water in the hold at the rate of 4½ inches per hour; satisfied that the vessel was not bilged, and the crew being worn out from pumping, concluded to stop the pumps until assistance could arrive from Key West, and went to work discharging cargo on board the Nonpareil as the vessel would have to be lightened if she was floated; loaded the Nonpareil that night and went to Tortugas and discharged the cargo a part on deck that night at midnight, and the balance of the deck-load next morning.

Fifth. The next morning, Tuesday, April 25th, at early daylight, returned in a small boat to the wreck and found alongside of her the schooners Magnolia and Golden Hind, which had ar-
41 rived early that morning from Key West; formed a second consortship with these vessels and their crews, manned the ship's pumps with all hands we could get on them, and after pumping for some time found that we were materially reducing the water in the wreck's hold. The schooner Cora with steam pumps on board from Key West hove in sight, stopped the pumps to wait her arrival, and during the interval, discharged cargo from the forward hatch of the wreck to lighten her; discharged on board of the schooner Magnolia about 450 rolls of wire. The schooner Cora arrived at the wreck at about 9 a. m. and was taken into the second

consortship. Before taking the steam pump from the Cora on board the wreck, placed the wreck's best bower anchor on board the schooner Magnolia with 75 fathoms of 7-inch hawser from Cora, and 60 fathoms of 7-inch hawser from the schooner Nonpareil. The schooner Foam of the Sea having arrived from Key West with the master of the wreck on board, anchored her about 250 fathoms from the stern of the wreck and hauled schooner Magnolia out to her and let go anchor in about 6½ fathoms of water, *led* hawser made fast to anchor through starboard chock of stern of wreck, put luff tackle on it and ran it to the capstan of the wreck and hove strains on the same; while anchor was being run Schr. Cora came alongside of the wreck, and as soon as possible had the Cora's Blake pump hoisted out and placed upon the deck of the wreck and the Cora placed in a position to furnish steam to connect with her pump from a boiler on Cora's deck. Everything being in readiness, started the steam pump, and after one hour's pumping, lowered the water in the ship's hold about 7½ inches, the sea then becoming so rough Cora was forced to disconnect steam pump and haul off from the wreck as was also the schooner Golden Hind with 285 rolls of wire from main hatch of wreck. This was about 10.15 p. m. The weather not permitting, nothing further was done that night.

Sixth. The next morning, Wednesday, April 26, the weather and sea somewhat moderating, hauled the schooner Magnolia alongside and loaded her out of forward hatch of wreck and dispatched her for Key West with about 968 rolls of barbed and other wire. The Foam of the Sea was then hauled alongside at about 2.30 p. m. and by about 5.40 p. m. loaded with about 64 bundles of barbed
42 and 390 bundles of long wire and dispatched her for Key West. During this day brought another steam pump from the Cora and placed it upon the wreck, preparing after vessel was sufficiently lightened to pump her out. Towards evening, the wind freshened and the sea became so boisterous that no more work could be done that day.

Seventh. The next morning, Thursday, April 27th, at 6 o'clock the weather having moderated, the schooner Cora came alongside of the wreck and commenced taking the wire from the main hatch of the wreck, this wire being taken out of the main hatch in order to place the suction pipe of pump lower in the hold. At 10.45 connected steam with centrifugal pump and commenced with the result that the water in the wreck's hold was lowered at the rate of about 1 foot an hour. At 2 p. m. the boiler gave out and stopped pumping; repaired boiler about 5 p. m. and resumed pumping, and lowered the water in the hold as far as the suction pipe would permit, to about 4 feet. During this entire time, the libellants were engaged in putting cargo on board of the Cora which continued until midnight when they had placed on board of her about 500 rolls.

Eighth. The next morning, Friday, April 28, at 6 o'clock commenced clearing cargo away in main hatch of wreck putting it on board the Cora so as to put centrifugal pump between decks; made a jettison of about one ton of wire that was rusted and worthless in

order to get space for suction of pump, it being too rough for any vessel to come alongside at that time, and at about 2.30 p. m. had a platform built and a hole bored for discharge of pump through vessel's side, and placed pump between decks, leaving boiler on deck of the wreck, which had been transferred from the Cora and which was being put in order so that the pumps might be resumed. The work of discharging the cargo on board of the Cora from the wreck continued up to dark when she had placed on board of her six hundred and forty rolls of wire. It being considered advisable that another anchor be run before the work of freeing the wreck was resumed, libellant, St. Clair, in the Nonpareil went to Tortugas for chain, none being available on board of the wreck at the time, obtained 30 fathoms and came back to the wreck; took two spare anchors from the wreck on board of the Nonpareil attached
43 them to the 30 fathoms of chain and made this fast to 80 fathoms of hawser belonging to the Cora and the wreck, then carried them straight out astern of the wreck about 110 fathoms and let them go so that one anchor backed the other, then led hawser through port stern chock of the wreck and put a luff tackle on it and ran it to the winch and hove it taut. At about 11 p. m. got boiler in working order and connected steam with pump between decks and started same and kept pump going on all night and gained on water in the hold considerably.

Ninth. The next morning, Saturday, April 29th, considered the vessel sufficiently lightened and proceeded to get everything ready to heave the vessel off at high water that evening; kept both steam pumps and hand pumps going continually. At 5 p. m. the schooner Magnolia arrived from Key West with a spare boiler, 20 barrels of coal and stores for wreckers; came alongside and discharged the same on board the wreck. At between 8 and 9 p. m. manned the capstan, winch and falls, and started to heave the wreck astern, a strong gale blowing from the eastward and a heavy sea, pumps kept going. At 10.30 p. m. had moved wreck astern 30 feet, sea breaking continually under and over her stern, and by 1 a. m., April 30th, hove the wreck into 3 fathoms of water and to within about 40 fathoms on starboard and 45 on port anchors; kept the pumps going continually, both steam and hand.

At about 2 a. m., boiler to steam pumps broke down, all hands then manned the hand pumps until boiler to steam pumps was repaired; succeeded in getting boiler to steam pumps started at about 10 a. m., then ran hawser from wreck to Schr. Golden Hind, and attached to hawser by which Golden Hind was riding, and hove wreck out into about 14 fathoms of water and let go her port bow anchor; got steam on spare boiler by 11 a. m., vessel leaking considerably, but pumps gaining on water in hold; at 10 p. m. one of the boilers gave out and water commenced to gain on us in vessel's hold; then manned hand pumps and kept them going with one steam pump up to May 1st, at about 1 a. m., when succeeded in getting steam on the other boiler and started the other pump; kept both pumps going, but one boiler being in bad condition, could

not properly feed the pumps, and about 6 a. m. found the
44 water slowly gaining on us in the hold; and, after consultation with Captains Pent, Sweeting and St. Clair, decided to let the vessel drop into shoaler water, and slacked away chain until she rested lightly on the bottom. About this time sighted a steamboat coming towards us which proved to be the tug Clyde; immediately upon sighting the steamer hove the wreck out into deep water to her anchor which took about ten minutes. As soon as the steamer came alongside, libellant St. Clair requested the tug's agent to put his pumps aboard which he did with the assistance of the libellant. The tug then connected steam with this pump and the Blake pump when they both started to work. This was at 7 a. m., and at about 1 p. m. gained 35 inches, then after pumping down about 5 inches more hove up the wreck's anchor, and proceeded in tow of the tug to Tortugas where we arrived at 3.50 p. m. Both pumps were kept going all night and the tug lay alongside to supply them with steam.

Tenth. The next morning, Tuesday, May 2nd, the tug supplying steam to pumps when necessary diver off Clyde went down under the wreck's bottom and reported it badly chafed. The Nonpareil was then dispatched to Key West for coal and another boiler, with wreck's captain.

Eleventh. The next morning, May 3rd, the diver from tug went down under wreck and did some patching, but did not stop the leaks; pumps kept going all the time; bent sails on the wreck and got her ready to leave on return of Nonpareil with boiler and coal, but afterwards concluded as the weather was good, with light westerly and northerly winds to proceed at once for Key West; started from Tortugas with wreck in tow of the Clyde about dark the same day; went outside and came to anchor when the engineer had another boiler repaired, but same would not last; kept two steam pumps going all night by steam from tug.

Twelfth. The next morning, May the 4th, again we got under way in tow of the tug for Key West all hands manning deck, deck pumps and one steam pump going all the time. At about 10 a. m. tug Clyde came alongside and connected her boiler with the pumps,
and pumps were again started and after water was consider-
45 ably reduced in wreck's hold, tug again took wreck in tow, one steam pump still working on the wreck as well as hand pumps. At about 7 p. m. tug Clyde again came alongside as before when wreck again proceeded in tow of tug and at about 12 p. m. arrived at Key West, and came to anchor in harbor; tugboat continued at work all night supplying steam to steam pumps which were kept going all night. The next morning, Friday, May 5th, the wreck was docked and master and consignee took charge.

Thirteenth. Libellants say that the several consortships with the list of vessels and crew hereinbefore referred to are hereto annexed as a part of this libel.

Fourteenth. That by their combined efforts, together with the assistance of the steamtug Clyde (which was not joined in this libel for the reason that your libellants are informed that the master and

owners of the said tug have or intend to file a separate libel in this cause against the said schooner Benjamin Hale and cargo for salvage services), they have saved the said schooner and cargo from loss; that the labor performed by them in such services was skilful and arduous, and attended with great risk to libellants and to their vessels.

Fifteenth. That your libellants have no knowledge of the value of the said schooner Benjamin Hale and cargo, and they pray that the same may be appraised by competent appraisers appointed by and under the authority of this honorable court.

Sixteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, they pray that process in due form of law according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said schooner Benjamin Hale her tackle, apparel, furniture and cargo, and that all persons having or pretending to have any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree unto them a reasonable and proper salvage compensation, and that the said vessel and cargo may be condemned and sold if necessary to pay the said salvage with the costs, charges and expenses,
46 and that libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

JAMES ST. CLAIR,
Master of Nonpareil.

G. BOWNE PATTERSON,
Proctor for Libellants.

Sworn to and subscribed before me this 10th day of May, A. D. 1893.

E. O. LOCKE, *Clerk.*

Whereupon the following order was made:

Let attachment and monition issue as prayed, returnable Wednesday, 17th of May, 1893.

JAMES W. LOCKE, *Judge.*

Whereupon attachment was issued to the marshal of the said district commanding him forthwith to seize and take into his custody the said American schooner Benjamin Hale and cargo wherever the same should be found in his precinct, and the same to safely keep until further order of this court, which attachment was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office; also monition was issued to the said marshal commanding him forthwith to cite and admonish all persons whomsoever having or pretending to have any right, title, claim or interest in or to the said vessel and cargo to be and appear before an admiralty session of the said court at its court-rooms in Key West, Fla., on the 17th day of May, A. D. 1893, at 10 o'clock

a. m. to answer the said libel, and to show cause, if any they have, why decree should not be pronounced as prayed, which monition was by him afterwards returned duly executed and with his return thereon endorsed is on file in the clerk's office.

And afterwards, to wit, on the 12th day of May A. D. 1893, came John Hall, master of the said schooner Benjamin Hale by his proctor, G. W. Allen, and filed with the clerk of the said court his claim to said schooner Benjamin Hale and cargo, in the words and figures following, to wit:

47 District Court of the United States, Southern District of Florida. In Admiralty.

REUBEN IRELAND
vs.
SCHR. BENJ. HALE & CARGO. } Salvage.

JAMES ST. CLAIR
vs.
SCHR. BENJAMIN HALE & CARGO. } Salvage.

And now comes John Hall and says that he is the master of the schooner Benjamin Hale, and as such is the lawful bailee of the said schooner and cargo, and he claims the same for the respective owners thereof.

JOHN HALL.

GEO. W. ALLEN, *Proctor.*

Sworn to and subscribed before me this May 12th, 1893.
E. O. LOCKE, *Clerk.*

And on the same day came the master aforesaid by his proctor aforesaid and filed his answer to both of the above-entitled libels, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida. In Admiralty.

JAMES ST. CLAIR ET AL.
vs.
THE SCHOONER BENJAMIN HALE & CARGO. } Salvage.

To the Honorable James W. Locke, judge of said court:

The answer of John Hall, master of the said schooner, to the libel of James St. Clair *et al.* and also to the libel of Reuben Ireland
48 (both cases having been consolidated and made one by order of this honorable court), against the said schooner and cargo, alleges as follows:

First. This respondent in answer to the first article in the libel of James St. Clair *et al.*, says that the allegations therein contained are true and he admits the same.

Second. To the second article of the said libel he says that the allegations therein contained are true, and he admits the same as far as they refer to his accepting the services of the libellant, and he, respondent, leaving with his crew on the schooner Foam of the Sea for Key West; as to the remainder of the said article he neither admits nor denies the same, as he was not present, having left for Key West to consult the agent of underwriters, and to get further assistance.

Third. To the third article he says that he neither admits nor denies the allegations therein contained.

Fourth. To the fourth article he says that he neither admits nor denies the same.

Fifth. To the fifth article he says that the allegations therein are true, and he admits the same.

Sixth. To the sixth, seventh, eighth, ninth and tenth articles he says that the allegations therein contained are true, and he admits the same, except that he denies that it was blowing a gale.

Seventh. To the eleventh, twelfth and thirteenth articles he says that he neither admits nor denies the same having again returned to Key West to consult agent of underwriters in regard to having vessel and cargo brought into this port.

Eighth. To the fourteenth article he says that he admits the allegations therein contained so far as they refer to the faithful work done by the libellants, but denies that this work was attended with great risk to libellants and their vessels.

And for answer to the several articles contained in the libel of Reuben Ireland, your respondent says that he was in Key West when the alleged services were performed, and neither admits nor denies the same.

Wherefore, respondent prays the court to restore the said
49 ship and cargo to him upon the payment of a reasonable salvage, and for such other relief in the premises as is right and just.

JOHN HALL.

GEO. W. ALLEN,
Proctor for Respondent.

Sworn to and subscribed before me, May 12, 1893.
E. O. LOCKE, *Clerk.*

And on the 15th day of May, 1893, the following order was made, to wit:

Ordered that these cases be joined and heard together, and that Jno. J. Philbrick, Jno. W. Sawyer and Jno. Williams be and are hereby appointed to appraise the value of the said vessel and cargo and report thereon.

JAS. W. LOCKE, *Judge.*

On the 16th day of May, 1893, the said appraisers filed with the clerk of the said court their report of appraisement in the words and figures following, to wit:

KEY WEST, FLA., *May* 17, 1893.

To the Hon. Jas. W. Locke, judge of the U. S. district court, southern district of Florida.

SIR: Having been appointed appraisers by your honorable court on Schr. Benjamin Hale as she now lies, and her cargo landed at this place, we herewith respectfully make the following report:

Total value of vessel and cargo, 33,728.60.

And afterwards, to wit: on the *the* 16th day of May, A. D. 1893, this cause came on to be heard before the said court.

Present: Hon. Jas. W. Locke, judge; W. C. Maloney, proctor aforesaid, appearing for libellant Reuben Ireland, and G. Bowne Patterson, Esq., proctor aforesaid, appearing for libellants, James St. Clair *et al.*, and Geo. W. Allen, Esq., appearing for the respondent in both cases; and the cause is heard upon the libels and the answer and the testimony of witnesses duly sworn, viz: For libellants Jas. St. Clair, Chas. J. Curry, P. T. Knight, and for respondent Jno. Hall, and Thomas C. Pent, and the premises are argued by the said counsel and submitted.

And afterwards, to wit, on the 17th day of May, 1893, the parties herein being present, it is ordered, adjudged and decreed as follows, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND ET AL. and JAMES ST. CLAIR ET AL. *vs.* THE AMER. SCHR. BENJ. HALE & CARGO. } Salvage.

This cause having been fully heard and the court being duly advised in the premises, and the saved property having been appraised by a board of appraisers appointed by the court at $33,728.60, the vessel at $8,000, and the cargo at..... ..... $25,728.60

286.20

$26,014.80

and cargo to the value of $286.20 having been brought in since, it is hereby ordered, adjudged and decreed that the entire service of all libellants be considered as one salvage service, and that they have received and recovered for the entire service rendered by them or any of them to the said property in the saving and preservation thereof, the sum of 25 % of the net value thereof, found by deducting from the said appraised value the costs, expenses and charges incurred in the care and preservation of the said property, together with the costs herein incurred, to be approved and allowed by the court, and that upon the payment of the said amount of salvage together with all the costs, charges, expenses and disbursements incurred on account of this disaster, the marshal surrender and restore to the claimant herein the said property for the benefit of the true

and lawful owners thereof; and it is further ordered that all
51 questions of the division and the distribution of the said salvage be held to await the further order herein.

And it is further provided that in event such salvage is not paid and any of such property is necessarily sold to pay the same, the proceeds so arising shall be taken and considered as the actual value instead of the value determined by the appraisement.

JAS. W. LOCKE, *Judge.*

And afterwards, to wit, on the 25th day of May, 1893, the costs, charges and expenses, and the questions of distribution herein having been considered, the parties herein being present, it was ordered, adjudged and decreed as follows, to wit:

District Court of the United States, Southern District of Florida
In Admiralty.

JAMES ST. CLAIR and REUBEN IRELAND ET AL.
vs.
AM. SCHR. BENJ. HALE & CARGO. } Salvage.

This cause having been fully heard and an interlocutory decree having been pronounced herein, and all matters concerning the determination of values and salvage having been duly considered, it is hereby ordered, adjudged and decreed that the salvors have, receive and recover for their services as alleged and proven from the owners of the said cargo five thousand, eight hundred and fifty ($5,850) dollars, and from the owners of the said vessel one thousand eight hundred dollars ($1,800), and it appearing that the vessel will not be able to carry the cargo forward, but that the interests will be separated here, it is ordered that upon the payment of said salvage awarded against either interest herein, vessel or cargo, by the claimant thereof, together with the costs, expenses and charges justly chargeable to that interest, the property be restored and delivered to the claimant for the benefit of the true and lawful owners thereof.

And it is further ordered, adjudged and decreed that from
52 the salvage upon said cargo there be first paid the first consort, consisting of the schooners Nonpareil and Foam of the Sea, and crews, as salvage upon cargo saved before the arrival of any other vessel, $460.40; to the second consort, consisting of all vessels rendering service before the arrival of the steamtug Clyde, for salvage upon cargo saved by them, $724.60; to the owners of the steamtug Clyde and Schr. Cora for the amount of expenses incurred and paid by them, pumping after the arrival of the schr. in the harbor, $530.84; for the use of the pumps and supervision of them for that time, $150; these amounts to be divided between the owners of the Clyde and the Cora according to their respective interests; to the owners of the Cora and pumps on board her for the use of said pumps while at Tortugas $200; to the submarine diver, $120; to the owners of the Clyde and crew of that vessel, to be divided two-thirds to the vessel and one-third to the crew, $600, the

residue of the salvage from said cargo after the payment of such allowances to the vessels for supplies furnished or damages suffered as may be allowed according to the standing rules of court among the vessels and crews of the second consort; and it further appearing that in all probability the salvage herein decreed on the vessel will not be paid, but that the vessel will necessarily be sold to pay the same, it is ordered that 25 % of the proceeds of the said vessel, her tackle, apparel and furniture and stores, after the payment of the just and proper charges, be considered as the salvage on the vessel, and that the steamer Clyde, her owners and crew have, receive and recover three-fourths thereof, to be divided ¾ to the tug and ¼ to the crew, and the remaining ¼ to be divided among the vessels of the second consort.

And it is further ordered that if the said salvage is not paid within ten days, the clerk issue an order of sale and the marshal proceed to advertise and sell the property and bring the process into court.

JAMES W. LOCKE, *Judge.*

May 25, 1893.

And afterwards, to wit, on May 27th, the clerk filed his statement as follows:

Total from cargo	$9,393.15
Due from vessel	2,355.89

53 And the said statements being approved, warrants of collection and restitution are issued to the marshal.

And on June 2nd, the representatives of the cargo having paid into the registry of the court $9,393.15, the said cargo is released. *Vend. ex.* is issued against vessel upon default.

And the costs are paid as appears by the bills annexed.

KEY WEST, FLA., *May* 10, 1893.

To Messrs. John Williams, master mariner; C. W. Bethel, master shipwright, and John W. Sawyer, merchant.

GENTLEMEN: The Am. Schr. Benjamin Hale, having been discharged of her cargo of wire, the master has requested me to order a further survey of his vessel to ascertain her condition and the cost of placing the vessel in a perfect seaworthy condition.

You are hereby requested to repair alongside and on board of said vessel and make an examination of her. You are also requested to employ a competent submarine diver to assist you in your examination and attach his report with yours.

If, in your opinion, the vessel can be placed in a thorough seaworthy condition at this port, you will please make an estimate of the cost of such repairs, and make such recommendations as you may deem best for the benefit of all concerned.

You will please make your report to me in writing to which you will be sworn.

Yours respectfully, CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

KEY WEST, *May* 12, 1893.

To Messrs. Williams, Sawyer & Bethel, members of the board of survey of Am. Schr. Benjamin Hale, of ——, —— ——, master, now lying in the port of Key West.

GENTLEMEN: According to your instructions I have made a survey of the bottom of the schooner Benjamin Hale, and report as follows:

Forward: Find forefoot gone about five feet up from keel,
54 lower part of stem split open, keel ground down nearly to garboard streaks, oakum sticking out of wood ends, cement in seams and butts on floor started. The planking on flat of bottom badly ground up fore and aft, averaging about five streaks on each side in some places nearly through particularly between fore and main masts, where butts show signs of heavy strains, oakum sticking out badly in places, found one hole where I could put in my whole hand and feel timbers on the inside, and strong inward suction, keel abreast here badly gone in places inside of garboards, starboard side worse chafed, find chafes in planking a few feet below water abreast of forerigging.

Aft: Find keel ground down nearly to dovetail plates, stern post good, in wood ends seam cement slightly started, where wooden battens and canvas have been partly nailed on, fore-and-aft seams started and open low down, more on port side where some battens are nailed on, but more seams wide open, gudgeons and pintles good but woodlock gone, bolts in keel aft sticking out from six to eight inches.

Submitted respectfully.

BRADISH W. JOHNSON,
Submarine Diver.

KEY WEST, FLA., *May* 13, 1893.

Charles J. Curry, notary public.

SIR: In compliance with your request, dated May the 10th, the undersigned again repaired on board the schooner Benjamin Hale, and held a thorough examination of the said vessel and herewith make the following report:

We find very little water in the vessel, hold entirely free from cargo, overhauled fore and aft, and found no visible strain or damage to the vessel from the inside, again overhauled hull of vessel from outside above water (she being now well out of water) found rudder broken away from rudder post, upper rudder brace started and wood ends around stern post opened, we also found planks aft of forechains on starboard side about three inches under the water badly chafed, and seams and butts around sides of vessel more or less opened and have to be caulked; no strain visible around decks
of vessel. We find from submarine diver's report hereunto
55 attached the condition of vessel's bottom. There being no convenience at this place to haul the vessel out of water, it will therefore be necessary to heave her down so as to be enabled to

put such repairs to keel and bottom of vessel as may be required to make her seaworthy.

By careful inquiring we find that the cost of heaving said vessel down, and keep her free of water for ten days, furnishing all gear and labor to perform said work, will cost twenty-five hundred dollars, and for materials and labor repairing said vessel to make her seaworthy four thousand dollars, not including the wharfage which is two cents per ton while the vessel is hove down.

We recommend Schr. Benjamin Hale be repaired and put in seaworthy condition.

We respectfully suggest that if *not* repaired at this place, that temporary work be done to said vessel, so that she can be towed to the nearest port where she can be taken out of water and repairs done as recommended.

Respectfully submitted.

JOHN WILLIAMS,
Master Mariner.
JOHN W. SAWYER, *Merchant.*
CHARLES W. BETHEL,
Master Shipwright.

COUNTY OF MONROE, *ss:*

I, Charles J. Curry, a notary public in and for said county, duly commissioned and sworn, dwelling in the city of Key West, do certify the foregoing to be true and exact copies of original documents on record in my office.

In testimony whereof, I hereunto set my hand and notarial seal this 17th day of May, A. D. 1893.

CHARLES J. CURRY,
Notary Public, Monroe Co., Fla.

56 *Diver's Report, Attached to Libel of Reuben Ireland.*

DRY TORTUGAS, *May 3rd*, 1893.

To whom it may concern:

At the request of the representative of the owners of the tug Clyde, I made a careful examination of the bottom of the Amer. Schr. Benjamin Hale, lately having been ashore on the Florida reef, assisted off by licensed wreckers and now in the harbor of Dry Tortugas, and found as follows, to wit:

Stern post started and seams and butts open the entire length of the vessel. I also found that the bottom of the vessel from the main to the forward hatch was very badly chafed in fact almost through, the keel is entirely chafed away, leaving only the bolts which are twisted in every conceivable shape. At the stern post the planks are open about one inch on the starboard side.

Repairs.

I made the following temporary repairs, battened both sides of stern post, also seam above garboard plank on port side about 15 feet long.

Respectfully submitted.

PELLER ROPER,
Submarine Diver.

KEY WEST, FLA., *May* 11, 1893.

To whom it may concern:

I have the honor to report that at the request of parties interested, I made an examination of the bottom of the Am. Schr. Benjamin Hale now lying at Taylor's wharf, Key West, Fla.

Started down at rudder on port side. I find the heel of the rudder is chafed from 6 to 8 inches, the keel from the stern post to a distance of about 6 feet is chafed about 8 inches from that point to the bow keel is chafed away to the garboards, and bolts under keel turned up from 3 to 7 inches. I find on the port side two pieces of sheathing or planking from the garboard streak up, starting at nothing from a point about five feet from the stern post and gradually thickening to about ⅞ of an inch, at or near the center of the
57 vessel, and from thence forward diminishing in the same manner; in several places they are chafed nearly through. I find also that the main planking is chafed nearly through in several places.

From rudder on starboard side. I found the entire part of that portion of the vessel that would rest on the ground badly chafed and some bolts in the planking near the keel projecting out about an inch. At a point about opposite the foremast, I found three large seaweeds sticking out from the vessel, and about three feet distant I found two others. I pulled on them, and they were so fast that I was afraid that if they were taken out it would cause the vessel to leak worse, so left them in there. I am of the opinion that the vessel is holed in both places and that the suction pulled in the seaweeds. I also find that oakum is out of the seams in several places on both sides of the vessel and the seams are open to such an extent that when placing my finger over them, I could see the mud sucking in the vessel from both sides of my finger. I also found several slats nailed along the garboards and seams on both sides of the vessel.

Very respectfully, ALONZO ALBURY,
Submarine Diver.

And afterwards, on the 24th day of June, 1893, the marshal returned said writ of *vend. ex.* duly executed showing that he had sold the said vessel, her tackle, &c., as commanded at public auction for the sum of five thousand and five dollars; which sum of five thousand and five dollars he had deposited in the registry of this court.

Whereupon the clerk having taxed the costs and expenses herein computes the salvage on the said vessel to be twelve hundred and twenty-five dollars ($1,225).

And the consignee files a supplemental account against the said vessel and cargo on ac. of the master forwarding the said cargo, and a special account against the said vessel and owners.

And on June 26th, M. S. Moreno, Esq., agent of the underwriters, pays into the registry of the said court $1,100 as a contribution towards the said expenses. Final average adjustment to be made hereafter.

58 Whereupon the clerk files his supplemental statement as follows:

IRELAND AND SINCLAIR ET AL.
v.
SCHR. BENJ. HALE AND CARGO. } Salvage.

Supplemental Statement.

Proceeds of vessel	$5,005.00	
P'd by underwriters ac. do	1,100.00	
		$6,105.00
Respondent proctor's fee	$137.50	
Marshal's fee and disbursements	171.83	
Clerk's fees and costs	94.90	
Consignee, bal. on 1st ac.	397.01	
" 2nd ac.	1,407.75	
" special ac.	1,589.06	
Salvage on vessel	1,225.00	
		$5,023.05
Residue p'd ag't of owners		$1,081.95

Respectfully submitted, E. O. LOCKE, *Clerk.*

Whereupon the salvage and the costs are paid in accordance with the said statement, and the residue is held in the registry of the said court to await the decision upon the petition filed June 27, 1893, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

JAMES ST. CLAIR ET AL.
vs.
THE SCHR. BENJ. HALE & CARGO. } Salvage.

To the Hon. James W. Locke, judge of said court:

The petition of the National Board of Underwriters of New York would respectfully show to your honor that by the evidence
59 and proceedings had in this honorable court in the case of James St. Clair *et al.* in a cause of salvage against the schooner Benjamin Hale and cargo, it would appear that said schooner was bound from Boston to Velasco, Texas, with a cargo of barbed and other wire; that while on her voyage she ran ashore on the Bahama banks and was obliged, in the opinion of the master, in order to save the vessel and cargo, to jettison a portion of her cargo; that afterwards the schooner again ran ashore on Bird Key shoal near Tortugas on the Florida reef, and the master was obliged to accept the assistance of wreckers in order to save the said vessel and the balance of her cargo; that the property has been placed to a great expense by paying salvage charges, costs of court, wharfage,

storage, reshipping, &c.; that the owners of the vessel failed to advance its proportion of salvage and expenses, and in consequence that the vessel had to be sold by order of this honorable court; that the vessel was sold for the sum of five thousand and five dollars, which amount was paid into the registry of this court; that there is now due from the above-named vessel an amount not yet ascertained to the cargo of the said vessel as its proportion to the contribution from general average charges:

Wherefore, your petitioners would most respectfully pray that after the salvage, court expenses and consignee's bills have been paid, that this honorable court will decree such sum to your petitioners from the remainder of the proceeds of sale as may be ascertained to be due as the share of the schooner Benjamin Hale in the contribution of general average charges, and for such other relief in the premises as may be just and right, and they will ever pray.

MASON S. MORENO,
Agent of National Board of Underwriters of New York.

Sworn to and subscribed before me this 22nd day of June, A. D. 1893.

GEO. W. ALLEN, *N. P.*

And the clerk pays the costs as follows:

Received from E. O. Locke, clerk, one hundred and thirty-seven and $\frac{50}{100}$ dollars, balance proctor's fee.

GEO. W. ALLEN, *Proctor.*

60 The plaintiff then produced a certified copy of a judgment and other proceedings and matters relating thereto in a cause of contract, between the master of the schooner Cactus and the cargo of wire formerly shipped in schooner Benjamin Hale, in the United States district court in admiralty for the eastern district of Texas at Galveston, it being agreed that the libel and other papers should be admitted as evidence of the facts therein contained, as though the same was taken by depositions of the parties or by other formal proofs; same following, and marked "Exhibit 16."

EXHIBIT 16.

Libel.

Filed August 7th, 1893.

To the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas:

The libel and complaint of L. S. Wiley master of the American schooner Cactus, and agent of James B. [illegible]ake of Bath, Me., managing owner of said schooner Cactus, against six hundred and sixty-six tons of barbed and smooth wire and staples, the same being the cargo of the schooner Benjamin Hale, lately cast away on Tortugas, Florida keys, and transhipped by John Hall, master of

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the Benjamin Hale, and agent for the owners of the said cargo, on the said schooner Cactus from the port of Key West to Velasco, Texas, consigned to the Washburn and Moen Mfg. Co., of Houston, Texas, in a cause of demurrage, affreightment, wharfage, and discharging, and other expenses, civil and maritime, showeth:

1. That the libellant at Boston, Mass., on the 14th day of June, A. D. 1893, by a certain charter-party of affreightment of that date, which is hereto annexed and marked "A" (this charter-party is marked Exhibit 10) and to which libellant craves leave to refer as a part of this libel, and also by bill of lading dated June 28th, 1893, annexed hereto and marked "B" (copy of Exhibit 18,) and hereby made a part thereof, did demise and let to freight the Sch. Cactus of the burthen of 508 tons or thereabouts, then in the harbor of Key West, Fla., unto the said John Hall, master of the schooner Benjamin Hale, and agent for the owners of said cargo, by which
61 said charter-party, libellant agreed to transport from Key West, Fla., to Velasco, Texas, about six hundred tons of barbed wire or smooth wire and staples, consigned to the Washburn & Moen Mfg. Co. of Houston, Texas, the said wire being a portion of the cargo of the schooner Benjamin Hale cast away upon Tortugas, Fla. keys, while on a voyage from Boston, Mass., to Velasco, Texas, said cargo being rescued from said schooner in a damaged condition and transshipped.

2. That among other things in the said charter-party the said charterers agreed to pay libellant for transporting said cargo from Key West to Velasco at the rate of two dollars and twenty-five cents per ton, freight payable upon arrival at destination, and charterers to load, stow and discharge the said cargo at their expense.

3. That it was agreed in the said charter-party that seven working days (Sundays excepted) should be allowed for loading the schooner at Key West, and five working days (Sundays and legal holidays excepted) should be allowed for discharging the said schooner in the port of Velasco, and that the said charterers agreed to pay said libellant in the sum of fifty dollars per day for each and every day of delay and detention over and above the stipulated time for loading and discharging.

4. That in pursuance of the said charter-party (the said schooner Cactus having been put in readiness to perform the said voyage) the said master, on the 16th day of June, A. D. 1893, at the hour of noon reported himself at the port of Key West to the said charterers ready to receive the said cargo on board the said schooner and the said charterers on the same day commenced loading the said schooner. But, notwithstanding that said notice was duly given, as aforesaid, and notwithstanding the schooner Cactus was from that time at the disposal and direction of the said charterers, and notwithstanding there was no fault on the part of libellant, the said charterers, by their own neglect, did not load the said schooner and give her dispatch from the port of Key West within 7 days but delayed her until the 28th day of June, 1893, at night, causing a delay of three and one-half days to libellant, when said charterers completed her lading and she cleared for the voyage set forth in the charter-party.

62 5. That the said schooner Cactus proceeded on her voyage and arrived at the port of Velasco, Texas, on the 14th day of July, A. D. 1893, and upon the same day the master of the said schooner reported to the Washburn and Moen Mfg. Co. of Houston, Texas, consignees of cargo that he was ready to discharge the same.

6. That the said Washburn and Moen Mfg. Co. refused to receive the said cargo although repeatedly requested by the said libellants so to do and though often requested to pay the freight and demurrage upon said cargo the said Washburn & Moen Mfg. Co. refused, and still continues to refuse to pay the same or any portion thereof.

7. That the said libellant awaited until the 1st day of August, 1893, and then commenced to discharge the said cargo at Velasco, to his own order, commencing to discharge at 7 a. m. and completing discharge on Aug. 5th, 1893, at 4 p. m. and that by reason of the said Washburn & Moen Mfg. Co.'s refusal to receive said cargo at Velasco, libellant was delayed fifteen and one-half days over and above the time stipulated for discharge in the said charter-party.

8. That the said libellant was forced to pay the cost of discharging, and wharfage charges thereon at Velasco, and for thirteen telegrams sent on behalf of said cargo, all of which expense to schooner Cactus was occasioned by default of said charterers.

9. By reason of the aforesaid premises the said cargo became liable to the said schooner Cactus for the sum of fourteen hundred and ninety-eight dollars and fifty cents freight upon six hundred and sixty-six tons of barbed wire, smooth wire and staples as per charter, the weight of said cargo having been carefully ascertained by libellants at Velasco.

And also for the further sum for demurrage at the rate of 50 dollars per day for three and one-half days' delay at Key West, and fifteen and one-half days at Velasco, amounting to the sum of nine hundred and fifty dollars.

And also for wharfage paid by said Cactus upon said cargo of 1,493,500 pounds at 1¼ cents per hundred ponds amounting to one hundred and eighty-six dollars and sixty-nine cents.

And also for discharging said cargo at Velasco, Texas, 666
63 tons at 75 cts. per ton amounting to four hundred and ninety-nine dollars and fifty cents.

And for thirteen telegrams paid by libellant on account of said cargo, thirteen dollars and eighty-five cents, all of the aforesaid amounts giving a total of three thousand one hundred and forty-eight dollars and fifty-four cents, payable by the said cargo to the libellant and libellant hereby claims a lien upon the said cargo for all of the said amounts.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the honorable court, and that the said six hundred and sixty tons of barbed and smooth wire and staples are now in the port of Velasco, in the said eastern district of Texas.

Wherefore libellant prays that process of attachment in due form

of law according to the course of admiralty and maritime jurisdiction may issue against the said cargo of wire and staples and that the Washburn and Moen Mfg. Co. of which company P. W. Moen is treasurer, and Wm. E. Rice, president, of Worcester, Mass., shippers of the said cargo of wire and staples, and that the Washburn & Moen Mfg. Co. of Houston, Texas, of which company Geo. A. Cragin is duly credited agent, and that John Hall, late master of the schooner Benjamin Hale, of Boston, Mass., and all parties interested in said cargo be cited to appear and answer all and singular the matters aforesaid and this honorable court will pronounce for the freight, demurrage, discharging, wharfage and all other charges claimed by libellant as aforesaid, with costs, and that the said 666 tons of wire and staples may be condemned and sold to pay the same, and that the court will grant to libellant such other and further relief as in law and justice they may be entitled to receive.

J. B. SHEA,
Proctor for Libellants.

L. S. Wiley, master of the American schooner Cactus the libellant within named, being duly sworn according to law, says that the matters stated in the foregoing libel so far as they are therein stated as of his own knowledge, are true, and so far as they are
64 therein stated as on information derived from others, he believes them true and that he is the master of the schooner Cactus and fully authorized to act therein.

L. S. WILEY,
Master Schooner Cactus.

Subscribed and sworn to before me the undersigned authority, this 5th day of August, 1893.

[SEAL.] F. W. VAUGHAN,
Notary Public, Brazoria Co., Texas.

In the District Court of the United States for the Eastern District of Texas, Holding Session at Galveston.

From the Minutes of said Court, October Term, October 19th, 1893.

L. S. WILEY ET AL.
vs.
666 TONS OF BARBED AND SMOOTH WIRE AND Staples *et al.* } No. 654, A. D.

And, now, to wit, on this 19th day of October, 1893, this cause coming on to be heard upon the pleadings and proof and arguments of advocate of libellant and claimant, and due deliberation being thereupon had, it is ordered, adjudged and decreed that the libellant L. S. Wiley *et al.* do have and recover of the said 666 tons of barbed and smooth wire and staples the amount of his claim, as set forth in libel, to wit: three thousand, one hundred and forty-eight and $\frac{54}{100}$ dollars ($3,148.54), together with costs of suit and expenses.

And upon motion of J. B. Shea, proctor for libellant, it is further

ordered, adjudged and decreed that unless an appeal be taken this decree within a period of ten days, after the rendition here that the clerk of the court shall proceed to pay the libellant much of the funds realized from the sale of said cargo of wire no in the registry of the court, as shall be necessary to satisfy aforesa claim of libellant.

It is further ordered, that unless an appeal *to* this decree is tak within the period aforesaid specified, the clerk of the cou
65 shall proceed to pay out of the said fund in the registry the court realized from aforesaid sale all costs and expens incurred.

It is further ordered that the amount due libellant in this decr may be paid to J. B. Shea, proctor for libellant, and the clerk hereby directed to draw the check in favor of said J. B. Shea cordingly for the use and benefit of the libellant.

ALECK BOARMAN, *Judge.*

Order of sale—Issued Sept. 8th, 1893.
Publication of sale made Sept. 9th, 1893.
Marshal's return—Filed October 9, 1893.

United States District Court, Eastern District of Texas, at Galvesto

L. S. WILEY, Master Am. Sch. Cactus,
vs.
SIX HUNDRED AND SIXTY-SIX TONS of Barbed and Smooth Wire and Staples. } No. 654. In Admiralt

The President of the United States of America to the marshal the eastern district of Texas, Greeting:

In obedience to an order made and entered in said court in sa cause on the 6th day of September, 1893, a copy whereof is he unto annexed and made a part of this writ, you are hereby co manded to sell at public auction to the highest bidder, for cash, the town of Velasco, Brazoria county, Texas, the said 666 tons barbed and smooth wire, and staples, after giving ten days' notice the time, place and terms of sale, by advertisement published in t Galveston *Daily News*, a newspaper published in the city and coun of Galveston, in the State of Texas, and deposit in the registry this court at Galveston, the entire gross proceeds of said sale, abide the further order of the court in the premises.

66 Herein fail not and due return of this writ make.

Witness, the Honorable David E. Bryant, judge of the d trict court of the United States, for the eastern district of Texas, a the seal of said court, at Galveston, this 8th day of Septemb A. D. 1893.

C. DART, *Clerk*,
[SEAL.] By W. L. HANSCOM, *Deputy.*

United States District Court, Eastern District of Texas, at Galveston.

L. S. WILEY ET AL.
vs.
666 TONS OF BARBED AND SMOOTH WIRE and Staples. } No. 654. Admiralty.

Upon consideration of the petition of the libellants herein for a sale *pendente lite* of the property libelled in this suit, and of the recommendation of the marshal presented therewith, and *with* appearing to the court that publication of the monition in this cause has been duly made and that no person has appeared or fi*e*ld any claim to said property.

It further appearing to the court that the greater portion of said property is exposed to the weather and is deteriorating in value, and that it is for the interest of the parties that all of said property be speedily sold.

Wherefore it is considered by the court and so ordered that the marshal of the eastern district of Texas, sell at public auction, to the highest bidder, for cash, at the town of Velasco, Brazoria county, Texas, the said 666 tons of barbed and smooth wire, and staples, after giving ten days' notice of the time, place and terms of sale by advertisement published in the Galveston *Daily News*, a newspaper published in the city and county of Galveston, in the State of Texas, and that the said marshal deposit in the registry of this court,
67 at Galveston, the entire gross proceeds of said sale, to abide the further order of the court in the premises.

DAVID E. BRYANT, *Judge*.

Tyler, Texas, Sept. 6th, 1893.

United States Marshal's Sale.

Published in Galveston Daily News by order of court.

The United States Court, Eastern District of Texas.

L. S. Wiley, Master of American Schooner Cactus and an Agent of James B. Drake, of Bath, Me., Owner of said Schooner Cactus, No. 654, *vs.* 666 Tons of Barbed and Smooth Wire and Staples.

By virtue of an order of sale issued out of the honorable United States district court for the eastern district of Texas, at Galveston, in the above-entitled cause, and numbered, and to me directed and delivered, I will sell the following-described property, to wit: 666 tons of barbed and smooth wire and staples, the same being the cargo of the schooner Benjamin Hale, lately cast away on Tortugas, Florida keys, and transhipped by John Hall, master of the Benjamin Hale, on the schooner Cactus from the port of Key West to Velasco, which I shall expose at public sale, as the law directs, on Wednesday, the 20th day of September, 1893, between the hours of 10 o'clock a. m. and 4 o'clock p. m., in the town of Velasco, Brazoria county, State of

Texas, for cash, to the highest and best bidder, to satisfy said order of sale.

J. J. DICKERSON,
U. S. Marshal, E. D. Texas.
JOHN M. WHELAN, *Deputy.*

Galveston, Tex., Sept. 9, 1893.

Marshal's Return.

Received this order of sale Sept. 8th, 1893, and I executed the same by publishing a notice of sale in the Galveston *Daily News*, a newspaper published in the city and county of Galveston,
68 State of Texas, as by said order directed that the sale would be made of said property on Wednesday, the 20th day of September, 1893, at the town of Velasco, Brazoria county, State of Texas, and by making sale to the highest and best bidder on the 20th day of September, 1893, of the 666 tons of barbed and smooth wire and staples for the sum of $10,000 to B. Blum & Co., they being the highest bidder thereof, and that being the highest secure sum bid for the same. Which has been paid into the registry of the court under said order.

I herewith attach costs and expenses of making said sale, marked Exhibit A.

J. J. DICKERSON,
U. S. Marshal, E. D. T.,
By JOHN M. WHELAN, *Deputy.*

Indorsements: No. 654. Admiralty. L. S. Wiley, master, etc. *vs.* 666 Tons Barbed and Smooth Wire and Staples. Order of sale. Issued September 8th, 1893. C. Dart, clerk, by W. L. Hanscom, deputy. Returned & filed Oct. 9, '93. C. Dart, clerk, by W. L. Hanscom, deputy.

U. S. District Court Registry Account.

1893.

Nov. 1.	Paid clerk's costs & com'r's fees in A. D. 654.	
" "	L. S. Wiley *vs.* 666 Tons Barbed Wire, &c., by order of court	$174.55
" "	Paid marshal's costs & expenses in above by order of court	729.33
" "	Paid J. B. Shea, proctor for libellant in above, fees & expenses, by order of court	70.35
" "	J. B. Shea, proctor, com'r's fee for taking dep't'n.	5.00
" "	J. B. Shea, proctor, freight & demurrage, allowed libellant, by order of court	2,448.50
" "	J. B. Shea, proctor, am't allowed libellant for wharfage, &c.	700.04
" "	Clerk's costs acc't respondent by order of court	3.00
		$4,130.77

United States District Court, Eastern District of Texas, at Galveston.

From Registry Account, page 248.

The United States district court in account with case No. 654.

L. S. WILEY, Master, &c.,
vs.
666 TONS BARBED & SMOOTH WIRE & STAPLES.

1893.		
Oct. 21.	To cash from J. J. Dickerson, U. S. M., E. D. T. proceeds of sale of 666 tons barbed and smooth wire and staples	$10,000.00
Nov. 1.	To amount paid out by order of court to satisfy decree and costs, as per itemized list on page 16 hereto attached.....	4,130.77
	Balance remaining in the registry of the court after the payment of above	$5,369.23

the District Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the district court of the United States, for the east- district of Texas, at Galveston, in the fifth circuit, and district afore- d, do hereby certify the foregoing to be a true and correct copy libel, filed Aug. 7, 1893; and Exhibits A & B attached to libel; cree, entered Oct. 19, 1893; order of sale issued Sept. 8th, 1893, th publication of sale and marshal's return thereon, issued Sept. , 1893, returned and filed October 9th 1893; extract from regis- r account showing amounts paid out by order of court & balance maining in registry in cause No. 654 on the admiralty docket of d court, entitled L. S. Wiley, master, &c., *vs.* 666 Tons Barbed & ooth Wire & Staples, as the same now appears of record, and on file in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this the 3rd day of May, D. 1895.

C. DART,
Clerk U. S. Dist. Ct., E. D. T., at Galveston,
By W. S. HANSCOM, *Deputy.*

Deposition of H. W. CORTES, taken in Houston, Texas, on May , 1895, which is as follows:

Q. 1. What is your name, age, and place of residence?
A. H. W. Cortes; residence, Houston, Texas; age, thirty-nine.
Q. 2. What business are you now engaged in, and how long have u been engaged in same?
A. Am in the hardware, wholesale and retail and agricultural plement business. Have been in the business here going on ten ars.

Q. 3. Does your business bring you in contact with the handling of all classes of barbed wire, smooth wire, staples, and goods of that character, and if so, what has been your experience in handling that line of goods?

A. We have been handling barbed wire, smooth and annealed wire, and dealing considerably in that line. Have been engaged in this business going on ten years.

Q. 4. During that time what has been your experience in that business with reference to the extent of the business you have been engaged in?

A. We handle large quantities of wire; have a good deal of experience in handling different lines—different names.

Q. 5. Were you familiar with the market price of barbed wire, smooth wire, staples, and goods generally of that character in August and September, 1893, in the markets of Velasco, Houston and Galveston?

A. I was familiar with the market value at that time.

Q. 6. Did you go to Velasco in 1893, September or August, for the purpose of examining a cargo of wire discharged by the schooner Cactus, and if you did, please state how you came to go there.

A. I was invited through the Washburn & Moen Manufacturing Company, by their agent, Mr. George Cragin, to go to Velasco to examine a lot of wire, and I think it was on Aug. 23 or 24, 1893.

71 Q. 7. Did you make an examination of the cargo?

A. Yes, sir; I went over the wire.

Q. 8. Now, please state the extent of your examination, and the extent of the investigation you made at that time, and the purpose of the investigation made by you.

A. I made a thorough examination, walked all over the pile of wire and found the barbed wire consisted of painted wire and galvanized wire, and found some twisted wire and smooth galvanized wire.

Q. 9. How much time did you spend in the examination of the cargo?

A. Probably about two and one-half or three hours; cannot say exactly.

Q. 10. What was the purpose of your examination?

A. For the purpose of ascertaining its market value and the extext of the damage.

Q. 11. From your experience in the business, as above indicated in your former answers, at what did you estimate the damage to the cargo in per cent.? State in detail your estimates of the cargo examined by you.

A. The reel of wire rope I found in good condition and fifteen barrels of clothes lines, of which I opened two or three barrels, and found them in good condition; 250 kegs of galvanized staples,—some were opened, some I opened, and found them in good condition; and five reels of insulated wire. This was badly mildewed, and I figured about twenty-five per cent. damage on that. There were 478 bundles of hay ties. This was badly handled, more or less

rusted. I estimated damage to this at ten per cent. There were some 1,146 bundles of plain wire and 39 bundles of galvanized plain, fine sizes of wire. This wire was in good condition. There were 485 bundles annealed wire. This was badly rusted and estimated the damage about fifty per cent. I estimate the damage in per cent. to the 39 bundles of plain wire and 485 bundles of annealed wire at fifty per cent. There were 578 bundles of galvanized plain wire. This was badly damaged, and I estimated the damage at sixty per cent. There were some 12,625 reels of barbed wire; I did not count them, but was so informed. I thoroughly examined them and found that the painted wire was very badly damaged and
72 worthless. The galvanized barbed wire was very badly damaged. I estimated the damage on that lot at sixty per cent. That comprised the cargo of the schooner Cactus.

Q. 12. Do you consider that the last wire that you referred to in your answer had any market value as wire?

A. No, sir; I do not think it had.

Q. 13. Upon what facts, Mr. Cortes, do you base your conclusion or estimate that that wire had no market value as wire?

A. The large quantity of it. It was hard to sell such a quantity of wire on account of being in such bad and rusted condition.

Q. 14. What do you estimate the damage to the total cargo in per cent.? That is to say, what per cent. of damage, in your judgment, from your examination, did the total cargo sustain?

A. I think it was about eighty per cent.

Q. 15. Please explain how you reached that conclusion.

A. I can arrive at the market value of it, figuring it out I can get the total amount of the cargo, and therefrom I get my estimate of the damage.

Q. 16. What composed the greater bulk of the cargo?

A. Galvanized barbed wire.

Q. 17. From your inspection of the cargo, how much do you estimate the amount of the painted wire to be, to which you have testified?

A. I cannot estimate it. It was impossible for me to get at it. The painted wire was mixed up with the galvanized wire, and I could not, therefore, tell how much there was of the painted wire.

Q. 18. Mr. Cortes, are you in any manner connected with the Washburn & Moen Manufacturing Company or the Reliance Marine Insurance Company, the parties to this suit?

A. I am not.

Q. 19. Have you now, or had you at the time you examined the cargo, or at any time before or since, any interest to the parties of this suit, or interest in the cargo?

A. I have not.

Q. 20. Mr. Cortes, from your examination of the wire and the other goods in Velasco, can you give an estimate of the reasonable market value of the cargo in the condition that it was then in at Velasco, in August and September?

A. It was worth about twenty per cent. of its value.

73 Cross-examination :

X Q. 21. How much would the cargo be worth if in Houston?

A. About ten per cent.

X Q. 22. What part of Velasco was this cargo of hard wire lying at the time you inspected it?

A. I found the galvanized barbed wire, painted wire, smooth galvanized wire and twisted wire, about three squares from the Velasco warehouse or dock. The balance of the cargo was in the warehouse at the docks; that is, the insulated wire, hay ties, wire rope, galvanized staples in kegs, and wire clothes lines in barrels.

X Q. 23. How much of that cargo, Mr. Cortes, was under cover?

A. The last mentioned was all under cover; the first mentioned was not under cover.

X Q. 24. Mr. Cortes, could you, as an expert, tell whether that cargo was injured by salt water or by rain water,—how much by salt water or by other causes?

A. By the salt eating on the wire.

X Q. 25. State how much was injured by salt water and how much by other causes.

A. About seventy-five per cent., I should judge, would be the damage by the salt water, and the other twenty-five per cent.

X Q. 26. Now, Mr. Cortes, how long would it take, from your experience as a hardware man, how much time would elapse, after the wire came in contact with the salt water, before it would be damaged?

A. I think the salt water, the moment it touched the barbed wire, would injure it. If it was to lie out on the docks for three or four months it would be worthless.

X Q. 27. Do you know how long the cargo lay on the docks at Velasco before you examined it?

A. I understand that she arrived there on the 5th of August.

X Q. 28. At whose instance did you examine the cargo?

A. I went at the instance of Mr. Cragin and in his company.

X Q. 29. What position did Mr. Cragin at that time occupy with the Washburn & Moen Manufacturing Company?

A. He was its agent. I received no compensation for my trouble in examining the cargo.

X Q. 30. Did you, or not, receive your traveling expenses?

A. I did.

74 X Q. 31. What became of the cargo, Mr. Cortes?

A. It was sold at auction.

X Q. 32. Who by and who was the auctioneer?

A. I do not know.

X Q. 33. Who purchased it?

A. Ben Blum, of Galveston.

X Q. 34. What did he pay for it?

A. I think it was ten thousand dollars.

X Q. 35. As an experienced hardware merchant, what would the invoice original cost of that cargo be at the factory?

A. About forty-five or fifty thousand dollars.

Direct examination resumed:

Q. 36. In your cross-examination, you stated that in your judgment the damage by salt water was seventy-five per cent., and by other causes twenty-five per cent. Please explain what you mean in this answer so it may be properly understood.

A. The seventy-five per cent. is in the salt water eating on the wire, causing that damage, and the wire was roughly handled.

Q. 37. Estimating that the total damage to the cargo is eighty per cent. and the damage by salt water is seventy-five per cent. of the whole cargo, what per cent. of the total damage do you estimate to have been caused from other causes?

A. About five per cent.

Q. 38. Do you know the condition of the weather at Velasco, with reference to raining much or little, or any, from the time the cargo was unloaded to the time you inspected it?

A. I do not know.

Q. 39. What is the condition of the weather generally in the month of August and September in this climate and at Velasco?

A. Usually August and September weathers are dry.

Q. 40. Do you know, of your knowledge, the date the cargo was unloaded?

A. I do not.

After all of the above testimony, all the exhibits and other evidence had been read to the jury or otherwise admitted, the plaintiff called as experts Arthur W. Parmalee, John D'Ewart and Addison B. Clements, who had been present at the trial, and who had heard all of the evidence, who testified as follows:

75 ARTHUR W. PARMALEE, sworn, testified as follows:

(By Mr. CARVER:)

Q. 1. What is your full name?

A. Arthur W. Parmalee.

Q. 2. Where do you reside?

A. At Worcester, Mass.

Q. 3. And what is your business?

A. I am a manufacturer of wire goods, hardware made from iron.

Q. 4. How long have you been engaged in that business?

A. About twenty-five years.

Q. 5. What is the name of your concern, please?

A. It is the Wire Goods Company.

Q. 6. Are you in any way connected with the Washburn & Moen Manufacturing Company?

A. No, sir.

Q. 7. And you manufacture all kinds of wires?

A. Yes, sir.

Q. 8. How long have you been engaged in the manufacture?

A. About twenty-five years in hardware, and most all that time especially in wire goods.

Q. 9. Are you acquainted with the value of barbed wire and other kinds of wire?

A. Yes, sir.

Q. 10. And were you in 1893?

A. Yes, sir.

Q. 11. And are you also acquainted with the manufacture of wire of all kinds?

A. Yes, sir.

Q. 12. Are you acquainted with the effect of sea water upon plain wire, painted wire, japanned wire, and galvanized wire?

A. Yes, sir.

Q. 13. Have you heard the testimony in this case in regard to what this cargo of the Benjamin Hale was subjected to?

A. Yes, sir.

Q. 14. And have you also heard the kinds of wire that were aboard?

A. Yes, sir.

Q. 15. And you are familiar with those kinds of wire?

A. Yes, sir.

Q. 16. What would be the effect of subjecting a cargo of wire, that cargo, to the perils and dangers which you have heard cited in this case?

A. I should think the wire that was under the salt water for that time would be ruined commercially.

Q. 17. What do you mean by "ruined commercially," as to value?

76 A. I mean that it would have no value in fact. I think the action of the salt water would destroy it so that the wire would not in fact have any value to one who knew what would be the result of it.

Q. 18. What would be the result of it?

A. Well, the wire would rust, and the action of the salt water on it, the salt water would soak into it somewhat as it would into a sponge, not so rapidly, of course, and it would rust, and continue to rust, very rapidly.

Q. 19. Now, is there anything that can be done to prevent that action after it has once commenced?

A. I don't think of anything you could do with this barbed wire; from its shape and style I don't see what you could do with it to save it.

Q. 20. Could anything be done with the plain wire?

A. We could succeed better with that, if we had it at home.

Q. 21. What would have to be done with that?

A. I don't know of anything I could think of that would get the salt out of it. You can reclaim rusted wire some, but if the salt has got into it I don't know any process to get it out.

Q. 22. What would you have to do to recondition the wire, put it in shape?

A. I should hardly know how to put the wire that had been soaked for three or four weeks in the salt water in order again. I don't know of any process.

Q. 23. Could you melt it over?

A. It can be melted over, yes, sir. The plain wire would have the value of scrap.

Q. 24. The plain wire would have the value of scrap?

A. Yes, sir.

Q. 25. When you say "scrap," what do you mean, scrap iron?

A. Wire suitable to go into a cupola, to be melted over.

Q. 26. About the galvanized wire, what would that value be?

A. That would have almost no value because the zinc on it would spoil it for the cupola.

Q. 27. Take the plain wire; how would the cost of melting it over and reconditioning it compare with its value after it was done?

A. The cost of the scrap wire would be very small item compared with the value of finished wire. The value of the scrap wire would be very small compared with the value of good wire.

Q. 28. But I ask you this question, Mr. Parmalee,—per-
77 haps it was a little blind,—you say that the plain wire could be melted over?

A. Yes, sir.

Q. 29. How would the cost of taking that cargo of plain wire to a place and melting it over, redrawing it and reconditioning it, so that it would be in good order, compare with its value after it had been done and delivered, say, at Velasco?

A. I can't estimate anything about the cost of freight, getting it back here. If we have the scrap here I can judge pretty closely what it would cost to put it in order again.

Q. 30. Suppose you had it here, would it have to be brought here to recondition it?

A. Unless there are mills suitable for it.

Q. 31. Are there any mills in Texas suitable for it?

A. I don't know of any.

Q. 32. How would it compare?

A. I should think the scrap wire might be roughly estimated as worth a seventh of the price of finished wire.

Q. 33. And that is for melting over?

A. Yes, sir; unless there is zinc on it.

Q. 34. I understand in the case of galvanized wire you say you could do nothing with it?

A. I shouldn't want it at any price.

Q. 35. What is the market in Key West for wire goods of the kind of wire of the cargo of the Benjamin Hale?

The COURT: You needn't put in any further evidence on that point.

Mr. CARVER: I was also going to speak in regard to the value of wire at Velasco.

Q. 37. What was the market value of wire at Velasco, as compared with the value here, in good condition?

A. It would be worth the freight and expense in addition to the price here.

Q. 38. Is all the barbed wire sent from Massachusetts out there?

A. It was sent from the Middle and Eastern States.

Q. 39. Have you ever seen wire submitted to the action of salt water, sea water?

A. Yes, sir.

Q. 40 And have you seen the effect of it?

A. Yes, sir; and at times have made various experiments to see what coating of hardware could protect it better than others.

78 Q. 41. Coating of what?

A. What coating of hardware would protect it from rust better than others.

Q. 42. You have made experiments in that way?

A. Yes, sir.

Cross-examination.

(By Mr. STIMSON:)

X Q. 43. Don't they dip galvanized wire in salt water in the process of manufacturing it? Isn't that part of the process?

A. I never heard of such a process; no, sir.

X Q. 44. Then isn't galvanized wire used very largely for ships' rigging?

A. Yes, sir.

X Q. 45. Were you here yesterday when Mr. Rice was testifying, of the Washburn & Moen Company?

A. Yes, sir.

X Q. 46. I understood from him to say that the galvanized wire suffered very little, the plain; that is, that the painted kind would suffer a great deal from the salt water; isn't that so?

Mr. CARVER: I didn't understand him so. He said galvanized wouldn't suffer as much.

X Q. 47. Isn't that so?

A. The general theory is that galvanizing wire protects it better than any other coating that we know of; but the ordinary painted wire is rather a cheap finish. I think a good-backed japanned wire would last as long as the galvanized wire would.

X Q. 48. Of course your remarks which you have just made about wire apply sole to that part of this wire which was actually submerged in salt water, and not to any part which was merely landed on the wharf afterwards, and perhaps rained on afterwards; you meant salt-water damage, did you not?

A. I spoke of that severe salt-water damage.

X Q. 49. If a lot of wire had been under salt water for a few days and was then put upon the wharf, and at once they had very heavy rainstorms, what would the effect be of that? Would it have any value in washing the salt out of the wire?

A. It would be rather beneficial than otherwise; the rain water would be less injurious than the salt water.

X Q. 50. Galvanized wire, when exposed to the action of salt

water in that way, is there not afterwards a sediment of white
79 deposit on it, visible upon it, which was caused by this salt-water rust?

A. I should suppose there would be.

(By the COURT:)

Q. 51. Mr. Parmalee, what is galvanized wire, old galvanized wire, worth a ton as scrap?

A. I should hardly know what to say.

Q. 52. Any value?

A. It has some value. There are men that can use it for some other purposes.

Q. 53. Any market value?

A. It is probably somewhere from fifteen to eighteen cents per pound.

(By Mr. STIMSON:)

X Q. 54. Whether one of the processes in making galvanized wire is not to submerge it in water charged with sal ammoniac, or something of that sort.

A. They do use sal ammoniac.

X Q. 55. And isn't that a salt water, one of the salts of sea water?

A. Well, I couldn't say about that.

X Q. 56. And one further question; when you said you were familiar with the markets at Velasco, and at Boston, were you familiar with them during the course of the year 1893?

A. Yes, sir.

X Q. 57. And can you tell me whether the market at Velasco, on the 20th of September, 1893, was higher or lower than the market in Boston in the previous March, 1893?

A. It was never lower there than it was here. I can't give you data without looking it up; I don't carry it in my head.

X Q. 58. I don't mean at the same time. I don't mean whether wire at Velasco was worth on Sept. 20 what it was in Boston Sept. 20, plus freight and expense, but whether the market for wire at Velasco in September was higher or lower than in March, in Boston?

A. I couldn't answer the question offhand; I should have to look up the records.

X Q. 59. Have you no memory of that year?

A. Yes, sir.

X Q. 60. Were the prices there as high as they were in September, six months before, in March?

The COURT: He has told you he couldn't tell you. I think I will have to stop that, Mr. Stimson; it is mere guesswork.

(By the COURT:)

Q. 61. Mr. Parmalee, if you had heard that a lot of five
80 hundred tons of galvanized wire for fences had been sold for eight or ten thousand dollars, would you think it sold for scrap?

A. I should be afraid the man who bought it had made a mistake.

Q. 62. Would you think it was bought for scrap?

A. If it was bought for scrap, it wouldn't bring anything like that.

(By Mr. CARVER:)

Q. 63. Will you tell us what you would think in regard to a man who purchased a lot of wire and paid $10,000 for it in Velasco, that had been subjected——

The COURT: Put that question again, Mr. Carver.

Q. 64. Will you kindly tell us what you would think in regard to a sale of that cargo of wire at Velasco for $10,000, if the condition as you have already heard read in September, 1893?

A. I think the man is stuck who bought it, as we say in the trade. He will find it out sooner or later.

W. JOHN D'EWART testified as follows:

(By Mr. CARVER:)

Q. 1. What is your full name?

A. William John D'Ewart.

Q. 2. Where do you reside?

A. Rutland, Mass.

Q. 3. How old are you?

A. Fifty-one.

Q. 4. What is your business?

A. Inspector of wire.

Q. 5. How long have you been in the wire business?

A. Thirty years.

Q. 6. Where have you been in the wire business?

A. In Manchester, Eng., and in Washburn & Moen's.

Q. 7. And you are now connected with the Washburn & Moen Manufacturing Company?

A. I am in my twenty-third year.

Q. 8. What do you have charge of?

A. Inspecting the wire before going on to the market.

Q. 9. Inspecting the wire before going on to the market?

A. Yes, sir.

Q. 10. Are you familiar with all kinds of wire goods?

A. Pretty much so.

Q. 11. Are you familiar with all kinds that are manufactured by the Washburn & Moen Manufacturing Company?

A. Not all kinds, but the greatest portion of them.

Q. 12. Were you familiar with all kinds of the wire that
81 were shipped on the Benjamin Hale?

A. The insulated wire I am not familiar with.

Q. 13. Are you familiar with the rest of it?

A. Yes, I am.

Q. 14. And you inspect it as it comes out?
A. Yes, sir.
Q. 15. Do you know how this barbed wire is made?
A. Yes, sir.
Q. 16. Will you tell us what the process was which was used in the manufacture of the galvanized barbed wire shipped aboard the Benjamin Hale? Tell us the process of manufacturing.
A. This wire is taken from a rod, a wire rod, and drawn to the given size, to the size of this wire; then it is annealed clean, and coated with spelter in process.
Q. 17. And then what is done with it?
A. Then it is taken to the barbed-fence machines and twisted in this way, and those barbs put up by machines which they have for that purpose.
Q. 18. Is there any portion of that wire what is called "wiped"?
A. Yes, sir.
Q. 19. Now, will you tell us what wiping means?
A. We run the wire between asbestos under pressure.
Q. 20. What is the reason for that,—what is the purpose of it?
A. To make it smooth, so that it will feed easily through the machines without interruption.
Q. 21. For any other purpose?
A. Well, I suppose it saves the spelter as well.
Q. 22. Now, take a piece of barbed wire before it is wiped, and take a piece of wire after it is wiped, which has the most spelter or zinc on it?
A. The unwiped has the most spelter on it.
Q. 23. And what is the spelter composed of?
A. Zinc.
Q. 24. Now, was the wire which was in the cargo of the Benjamin Hale wiped wire?
A. All fence wire is wiped wire.
Q. 25. Now, these barbs that are spoken of, how are they made?
A. They are crowded round the wire.
Q. 26. And then they are cut off?
A. Yes, sir.
Q. 27. So that the ends of the wire are bare iron?
A. Yes, sir.
Q. 28. The ends of the wire are bare iron?
A. Yes, sir; no spelter on that.
82 Q. 29. The ends of the barbs, I should say?
A. Yes, sir.
Q. 30. What is done after that? After that is completed, after the barbs are put on, how is it put up commercially?
A. Put up on reels made in the shape of spools.
Q. 31. Do you know how much they put on?
A. Somewhere about a hundred pounds; I don't know exactly.
Q. 32. Is that reeled like a rope?
A. Yes, sir.
Q. 33. And that is done by machinery?
A. Yes, sir.

Q. 34. So that portions of the barb strike the plain part of the wire?

A. I don't see how it could avoid it.

Q. 35. Are you acquainted with the effects of salt water on galvanized and plain wire?

A. Yes, sir.

Q. 36. Have you ever had experience with the use of salt water in regard to wire?

A. Yes, sir; I experiment a great deal with it myself.

Q. 37. Have you ever heard the testimony here of what occurred to this wire on board the Benjamin Hale?

A. Yes, sir.

Q. 38. Have you heard it read?

A. Yes, sir.

Q. 39. And the condition it was seen in down there?

A. Yes, sir.

Q. 40. What would be the effect of such an experience to a cargo of barbed wire, that is, with regard to that portion of the wire which was wet?

A. It would be utterly ruined.

Q. 41. What could be done with that wire?

A. Nothing; not to remove the salt; you can't remove salt from wire.

Q. 42. Would the plain wire have any value?

A. It would be worthless, worse than the galvanized, again; that is, for salable purposes.

Q. 43. Could anything be done,—could this wire be melted up, this galvanized wire, and used over again?

A. Yes; we could cut it up and melt it, and work it over again.

Q. 44. Could you cut up the barbed wire and melt it over again?

A. I guess they wouldn't give you much for it. It is possible to do it, but it wouldn't be worth much.

Q. 45. If you should melt up this wire with the zinc in it, and should afterwards make it up into wire, how would the cost of melting it and putting it into condition again compare with its
83 value after it was put into condition?

A. I don't think it would pay, because the spelter is injurious to iron; it doesn't make good scrap iron, and if they had to buy it, I don't believe they would purchase it at all. We try to use up our own scrap. I don't think they would buy it.

Q. 46. But your own scrap is not subjected to salt water?

A. No, sir.

Q. 47. Would this salt water cause this wire to rust?

A. Yes, sir.

Q. 48. Would anything stop that rusting?

A. Where it is perfectly covered, I don't know about that, but in the loading up there, there is a very thin covering on there, and if the wire is anywhere cracked or cut with the barb it is just as sure as slow consumption; that is, it may take some time for it to be rotten, but it is just as sure as it has got in there it will be rotten.

Q. 49. Can you get it out in any way?

A. You can't get it out in any way, nor bake it out. I say you can't remove it in any way; you can't either bake it out or burn it out.

Q. 50. You said something about the wire having portions of it clipped off by the barb.

A. Yes.

Q. 51. What was that?

A. That removes the spelter, leaves it bare.

Q. 52. That is, if the barbs touch the plain part of the wire——

A. The spelter is very thin, I say, and wherever it has got cut the salt water will take effect.

Q. 53. As I understand you, in reeling the wire these sharp points are liable to remove some of the spelter from the plain part of the wire?

A. Yes; it is liable to.

Q. 54. How do you know the salt can't be removed?

A. It has been tried at our place.

Q. 55. Have you tried it?

A. It has been tried under my supervision.

Q. 56. You are acquainted with the value of wire?

A. Not particularly, I am not. I haven't anything to do with the prices of wire.

Q. 57. You don't have anything to do with the price?

A. No, sir.

84 ADDISON B. CLEMENTS (*sworn*).

(By Mr. CARVER):

Q. 1. What is your full name?

A. Addison B. Clements.

Q. 2. Where do you reside?

A. Worcester, Mass.

Q. 3. And what is your business?

A. Chemist.

Q. 4. And have you had any business connection with relation to wires?

A. Yes, sir.

Q. 5. How long have you been a chemist?

A. I have been with this Washburn & Moen Manufacturing Company for ten years.

Q. 6. How many years?

A. Ten years.

Q. 7. And have you ever been with any other concern?

A. Yes, sir.

Q. 8. Who?

A. The Worcester steel works, and the Birmingham, Ala., steel works.

Q. 9. And is your business confined to hardware and wire as chemist?

A. Nearly everything in the wire line.

Q. 10. You are acquainted with how this wire is manufactured?

A. Yes, sir.

Q. 11. And what the component parts are that go into this manufacture?

A. Yes, sir.

Q. 12. Have you heard the testimony here with regard to what occurred to the cargo of the schooner Benjamin Hale?

A. Yes, sir.

Q. 13. You have been present here and heard the testimony?

A. Yes, sir.

Q. 14. And you know the different kinds of wire that were in the cargo, you have heard them stated?

A. I have heard them all stated.

Q. 15. And you know what those terms mean?

A. Yes, sir.

Q. 16. Now what would be the effect of the wire on the Benjamin Hale that was wet by sea water?

A. The wire that was coated with zinc would stand the longest.

Q. 17. But I mean, what would be the effect on the value of the wire with regard to the action of these perils that have been described here, both the galvanized and the other kind?

A. Well, its market value is destroyed as wire for the purpose intended.

85 Q. 18. And that applies to all kinds of wire that have been described here that had been wet?

A. Yes, sir.

Q. 19. You don't know anything about the market value, I believe?

A. No, sir; I have nothing to do with that.

Q. 20. Did you ever make experiments with regard to these wires?

A. Yes, sir.

Q. 21. After the wire has been subjected to sea water and commenced to rust, is there any way you can get the salt out of it?

A. No, sir; except you destroy the wire.

Q. 22. Except you destroy the wire?

A. You have to destroy the wire to get rid of the salt.

Q. 23. Something has been said about sea water; do you know what sea water is composed of?

A. Everything.

Q. 24. I have heard there is gold in sea water, but what do you mean by everything?

A. All known elements are contained in sea water in solution.

Q. 25. How does that differ from salt which you put in water?

A. That would be merely salt and water.

Q. 26. What would be the effect of sea water as compared with salt and water on iron goods?

A. I have never made any direct experiments, but I should think full as bad as common salt water.

Q. 27. Why?

A. There are other elements to enter into the injurious action against the wire in sea water than there is in common brine.

The defendant introduced the following evidence:

Robert M. Hanna.

ROBERT M. HANNA testified that he was fifty-six years of age; was the chief inspector for the National Board of Marine Underwriters of New York; that he proceeded to Key West May 9, 1893, at the request of J. Raymond Smith, secretary for that board, for the purpose of looking into the disaster of the schooner Benjamin Hale as a representative of the underwriters on hull and cargo; that he arrived at Key West May 12, and at that time all of the cargo of the schooner Benjamin Hale was at Key West except a little that was at Tortugas; that while at Key West it rained hard; that he has
86 represented the National Board of Marine Underwriters since 1887, and valued all kind of cargoes around South America and different parts of the world.

Upon being asked the fair market value, he said he could not answer the question as he did not think there was any market value at Key West; that he did not know the market value of wire in Texas, but he was familiar with the value of wire in New York because he had the price in his hand which was given him by the secretary. He stated that in his judgment the market value of the cargo as it was in Key West would have been, if it had been at a place of shipment, fully $40,000; that in his opinion only a small portion of galvanized wire was damaged, and that the plain wire was damaged fully 50 %; that the sound wire was under cover, but the wire that was wet was all out of doors, and there was galvenized and painted wire, and plain wire without being painted; that some electric wire or hawser and there were staples all unhurt; that it is rarely that a vessel goes from Key West to Velasco; that the freight from Boston to Key West would be as much as the freight from Boston to Velasco. That Captain Hall met him when he arrived at Key West and authorized him about May 18 to charter the Cactus for $1,000.

On cross-examination he stated at this time he was in the employ of the National Board of Marine Underwriters, in which he had been employed since 1887; that the defendant company is a subscriber to the said board. He knew that he represented the underwriters, both on cargo and hull; that he went home before the cargo was forwarded on the schooner Cactus, leaving matters for the underwriters on cargo in charge of Mason S. Moreno; that he superseded him when he went there, and when he left there Mr. Moreno then had charge for him; that he is the agent for the board at Key West; that when he left Key West he instructed Mr. Moreno about shipping the cargo and to take charge of the same; that he had paid the money into court in the salvage suit at Key West; that he instructed Mr. Moreno to see that the vessel was secured, and that the cargo was properly shipped to Velasco, according to the original bill of lading; that he told Mr. Moreno to get a bill of lading from the Cactus; that he

offered to charter the Cactus in New York after her return;
87 that he always insisted on Captain Hall's forwarding the cargo. He knew that Captain Hall left Key West and came to Boston before the Cactus was chartered; that at the time Captain Hall left, the vessel was in charge of the court; he left no master there. He left Mr. Taylor in charge of the cargo, with his power of attorney to take charge of the ship. He did not know of any abandonment by the Washburn & Moen Manufacturing Company until two months after he left Key West. He did not see any representative of the owners of the cargo at Key West. He employed and paid counsel in behalf of the underwriters on cargo to defend the salvage suit; that he paid other disbursements, the amount of which he has shown in a bill which he has hereto annexed, marked "Exhibit 17;" that Mr. Moreno paid eleven hundred and ninety dollars expenses in relation to the cargo; that he never bought or sold any barbed or plain wire in his life; never acted as broker for the sale of any; did not know of the sale of any plain or barbed wire during the year 1893; that all the knowledge he had with regard to the value of the cargo was derived from the invoice he took from New York, and the appearance of the damage; that he has sold a great deal of cargo in the last eight or nine years, but does not recall an instance of selling any damaged wire except the sale of some he made at Montevideo, a cargo which was bound to Chili. He never sold any in the United States; that he thinks that if cargo commenced to rust, a little oil or paint would help it; that he had no experience as to the action of salt water on galvanized or plain wire, except on this cargo; that his knowledge was confined to this.

On redirect examination he stated he did not see any rust on the cargo except what he has already stated; that he saw nothing like white powder or any like substance; that a copy of his expenses was put in, marked "Exhibit 17."

Deposition of Mason S. Moreno.

Taken in Key West, May 10, 1895.

The said MASON S. MORENO, being about the age of thirty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the
88 matter of controversy aforesaid, I did carefully examine the said Mason S. Moreno, and he did thereupon depose, testify and say as follows, viz: My name is Mason S. Moreno; I am thirty-eight years of age; my residence is Key West, Fla.; I am resident correspondent of the National Board of Marine Underwriters of New York, and also postmaster of the city of Key West; during the latter part of the year 1893, news reached me from Tortugas that the American schooner Benjamin Hale was ashore; I at once dispatched a tug with a special representative on board to render her assistance, at the same time advising said representative to use every means possible to bring the vessel and cargo to the port of Key West; the cargo of the schooner Benjamin Hale was galvanized

barbed iron wire, some painted, and hay-binders; also somewhat appeared to me to be telegraph wire, and one very large wire cable or hawser; the said vessel and cargo were brought to Key West with the exception of a few bundles of wire that had been jettisoned in the endeavor to float the ship; there was also a portion of the cargo consisting, I should judge, of about three thousand bundles landed at Tortugas, which was afterwards brought to Key West by salving vessels; the remainder of the cargo was brought to Key West, to the best of my knowledge, intact. (*Plaintiff's proctor objects to the answer of witness as being hearsay.*)

When I mention that three thousand bales were taken from the vessel, I do not mean to say that the entire lot of three thousand was landed on the beach of Tortugas, as some of it was placed on the salving vessels from the Benjamin Hale and brought to Key West direct, and afterwards the part landed at Tortugas was brought to Key West.

After the arrival of the Benjamin Hale at Key West it was found that she was leaking badly, and it became necessary to discharge her cargo. A portion of it was placed in the warehouse of Messrs. Taylor & Curry at Key West, and the remainder was stored on the land adjoining the said warehouse; all cargo brought up by salving vessels was also stored on same property. The cargo not stored in the warehouse was not placed upon the ground, but was stored on skids. The greater bulk of the cargo that was stored outside of the warehouse was galvanized iron barbed wire. It was my duty
89 to protect the cargo in every way possible with regard to its being properly stored, etc. I saw all of the cargo after it arrived at Key West, and thoroughly examined the same, and I do not consider that the cargo, or any portion of it, was damaged after it was stored at Key West, excepting that a few of the bands that had held the bundles of wire together became broken and the wire separated; these I had repaired and put in proper shipping condition; I would say that I cannot tell how many. I should judge approximately about two hundred bundles became separated in this manner. I do not consider that the galvanized wire was damaged at all either before or after it was landed, as it was very heavily plated; I mean with the exception of the breaking of a few bundles as above stated. (*Proctor for plaintiffs objects to the opinion of the witness being given, as it has not been shown that he has been an expert.*) In my opinion the galvanized iron wire was not in any way damaged by salt water before it was landed. In my opinion I should judge that the entire cargo, taken as a whole, was not damaged more than twenty-five per cent. of its entire value. In my opinion Key West is not a market for wire of this kind, as there is no demand for it and there is no use for it in Key West. I had the cargo prepared for shipment; it was shipped in good condition, I mean reshipped, on the American schooner Cactus, bound for Velasco, Texas. Schooner completed loading June 28, 1893, and proceeded to sea June 29, 1893. It was reshipped in good condition, in my best judgment, except the damage as already stated.

Cross-examination by Mr. PATTERSON, attorney for plaintiff:

I think the greater portion of the three thousand bales which I stated the wreckers brought up here was stored on the land adjoining the warehouse on skids. I examined the vessel's hold before the cargo was taken out of her at Key West. I should judge about one-third of the cargo that was in the vessel's hold at that time was submerged or under water. Some of the cargo discharged from the hold of the Benjamin Hale was also put or stored outside of the warehouse on skids on the land. I think that there was about as much of the cargo taken from the vessel and stored outside as there was of the three thousand bales stored outside. The reason
90 that a portion of the cargo was stored outside and a portion inside was that a party to whom the vessel was consigned had no other facilities. I believe that there was a small portion of the cargo brought here by the wreckers before the arrival of the Benjamin Hale. The first that was brought here before the arrival of the Benjamin Hale was put in the warehouse. In my recollection all of the raw painted iron wire that was first brought here by the wreckers was placed in the warehouse. It was found that the warehouse would not hold all the cargo and we put the best of it, that is, what would sustain more damage outside, inside of it. Our object was to put as much of the dry cargo in the warehouse as possible. Some of the painted raw iron wire and hay-binders was rusted. The bindings of the bundles that I mentioned as having been separated were broken in the discharge of the cargo. I made an examination of the galvanized iron wire and saw none of it that showed any signs of rust. Those bundles with the broken bands on them were put outside. When the bands would break from the bundles which I have spoken of the wire would come uncoiled.

When I say in my opinion that the entire cargo was not damaged more than twenty-five per cent., I did not base this opinion upon figures, but from an examination of the cargo and an estimate. I do not know how many bundles of cargo there were; I do not know how many bundles of barbed wire were landed here. I did know but do not know now. I do not know that it is a fact that the appraisers found over 10,000 bundles of damaged barbed wire; I never saw their report, and after the special agent came here I had no further connection with the case until it became necessary to reship the cargo. I never had any experience before this time of examining cargoes of this character and estimating the damage. I never had any connection with iron works or the manufacture of iron so as to enable me to testify as an expert, except purchasing wire for my own vessels and noticing the effect of salt water on them. The extent of my buying wire for vessels is for rigging and stays for them; this has not been very extensive, not more than $30 a year for the past twenty years, and my purchases have been confined to Key West. My experience is that the action of salt water on wire (galvanized) where it is most submerged is greater than
91 where it is not submerged. (*Attorney for defendant objects to answer of witness on the grounds that he is not testifying to anything brought out by the direct examination.*)

I have noticed that some wire that I have purchased, when exposed to salt water will show corrosion in one year, and some would not under two years.

Direct examination resumed:

At the time that I examined the cargo in hold of vessel, and say that about one-third of the cargo was submerged, the steam pump was going a portion of the time; most of the one-third cargo submerged was galvanized iron wire. I think the greater portion of the cargo taken from the Benjamin Hale was stored inside house. The greater portion of the cargo stored outside on skids was galvanized iron wire.

Deposition of Peter A. Williams.

Taken in Key West, May 10, 1895.

The said PETER A. WILLIAMS, being about the age of fifty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Peter A. Williams, and he did thereupon depose, testify and say as follows, viz: My name is Peter A. Williams; I am fifty-seven years of age; my residence is Key West, Fla.; I am president of the board of trade of the city of Key West. In the month of May, 1893, I was United States marshal for the southern district of Florida. As said marshal I had the schooner Benjamin Hale in my custody, by virtue of an attachment issued out of the United States district court in a salvage suit. I mean the schooner and cargo. The cargo consisted of barbed and other wire. I had the cargo in custody all the time the case was being considered by the court, and until the salvage was paid. I saw the cargo frequently and made an examination of it; the greater portion of the cargo consisted of galvanized barbed wire, I think; I have had very little experience with galvanized iron wire,—some, I have seen it used on the mainland of Florida for fences. I have had experience with galvanized iron wire
92 rigging on vessels. In my opinion, from an examination of the cargo, I thought that the report of the appraisers was right, that is, the cargo was damaged, I should judge, about thirty per cent.; I mean, the appraisers appointed by the court to fix the value of the cargo for salvage purposes, I saw their report at the time. In my opinion, after the cargo was discharged at Key West, it did not receive any damage, but was benefited, if anything. I do not consider Key West a good market for wire of that description, because there is no demand for it. I considered the cargo was benefited because that portion of it stowed on the dock received the benefit of several heavy rains which washed the salt water out of it.

Cross-examination:

I have simply seen wire in fences on mainland. The opinion that I have given was arrived at by an examination for the purpose

of arriving at the amount of damage; the examination was mad at the time it was coming off of the vessel. I saw almost ever bale. I was down there five or six times a day.

Q. Did you make an examination of this cargo with a view of as certaining the actual damage it received, in order to base an opinio thereon?

A. I answer yes to that; to base a general opinion on. I was no an appointed appraiser; I was not connected in such a manner wit the salvage suit as to make it necessary for me to ascertain the dam age of that cargo. I did not keep account of the bales as they cam out of the vessel. I do not think I had an attachment of all th cargo before it was discharged at this port. I made no account examination for the purpose of attachment. I got number of bal from consignee's account. The examination I say I made wa made before and after I got attachment. I think I saw pretty ne the whole cargo as it was discharged from the vessels and as it wa piled up. I did not go down each day and remain there durin the discharging of this cargo in working hours continuously. would go down there during the discharging of the cargo five six times a day, and remain there about fifteen or twenty minut each time. The galvanized wire was stained a little, but I did n notice any rust on it. The other wire was not rusted when it fir came out, but was stained black and would rust afterward

93 The damage of thirty per cent. that I have testified abou to the wire, consisted, considerable of it, in the wire comi unrolled, ugly bunches and mashed, and being wet by the sa water.

Direct examination resumed:

The wire did not come loose in a greater portion of the carg My fee as United States marshal depended on the amount of salva awarded by the court, as I was interested to the extent in determi ing the value of the cargo. I had an attachment on all of t cargo, and had it in my custody and examined it all before it w reshipped. My examination was as I have stated.

PETER A. WILLIAMS.

Deposition of John W. Sawyer.

Taken in Key West, May 21, 1895.

My name is John W. Sawyer; I am forty-seven years of ag my residence is Key West, Fla.; I am a merchant of Key We Fla. I remember the schooner Benjamin Hale and cargo. I w appointed by the United States district court as an appraiser in salvage suit against schooner Benjamin Hale and cargo, for purp of appraising value of schooner Benjamin Hale and cargo, abo the 16th of May, A. D. 1893. I made a careful examination of t cargo that was ashore. I was the greater part of the day maki the examination. The cargo had not all been discharged at t time; there was a small amount remaining on board. The ca

consisted of barbed wire fencing, lot of copper wire, and a lot of hay-binders. I examined the cargo also that was left on board the schooner after it was taken off. The greater part of the cargo consisted of galvanized iron barbed wire. In placing the value of the cargo, I was governed by price-lists of the value of the cargo at the time, and ascertained the damage to the cargo by examination. I did not consider the galvanized iron wire much damaged; the painted wire was damaged. Some portions of the wire were not damaged at all. I thought at the time, and think now, that thirty-five per cent, was the whole amount of damage to the cargo taken as a whole.

94 Cross-examination:

I am a clothing merchant, also vessel-owner. This wire was stored on skids near dock of Taylor & Curry. It was piled one bundle on another, eight or ten feet high; the balance was in warehouses. The examination I made at the time was not to ascertain the damage, but to find out the then value of cargo.

JOHN W. SAWYER.

Deposition of James St. Clair.

Taken in Key West, May 16, 1895.

My name is James St. Clair; I am thirty-four years of age; my residence is in Key West, Fla. By occupation I am a pilot. At present I am master of the pilot-boat Rapid, belonging to the port of Key West, Fla. In the month of April I was pilot and master of the pilot-boat Nonpareil. The Nonpareil was also at that time a licensed wrecking schooner. As master of the licensed wrecking schooner Nonpareil I was engaged at the wreck of the schooner Benjamin Hale. It was in the latter part of the month of April, 1893, that I went to the wreck of the schooner Benjamin Hale. I went down to Tortugas and found the schooner Benjamin Hale ashore and offered my assistance. I found that she was loaded with a cargo of barbed and other wire. She was ashore on Bird Key shoal, near Tortugas. When I arrived there she had been ashore about three or four days. I do not remember the exact day I arrived there. It was somewhere around the 21st or 23d of April. It was in the evening. I then offered my assistance to the master, and the same was accepted. I could not do anything that night, as there was a good sea running there, and I could not get my vessel alongside of her. I took the master off then and took him into Tortugas harbor. I spent the night in Tortugas harbor. That night I made a consortship with the wrecking schooner Foam of the Sea for her to assist me with the wreck. The next morning I went out and took the captain out to the Benjamin Hale, with what men I could get at Tortugas. I sounded around the vessel and
95 found out how much water there was around her, and sounded her pumps and tried them. I found that the vessel was hard and fast ashore, and we could not find that we made any

impression on the pumps. I concluded that the vessel was bilged, and commenced to save cargo. This was done at the request of the master.

I loaded my vessel, the Nonpareil, with wire, and carried the same to Tortugas harbor and discharged the same ashore. I carried the first load about 450 bundles of wire. I went back again and loaded my vessel and carried the load into Tortugas. I took in, in all, into my vessel, and discharged at Tortugas, about 850 bundles of wire. I discharged this wire at the Buoy dock at Tortugas and stored it in the Government shed. It had not been wet in any way. It was not wet or damaged in any way after it was at Tortugas. It was stored in Tortugas from three to four weeks. I then sent the schooners Nonpareil and Foam of the Sea to Tortugas, and they brought all of this wire that I had stored there up to Key West. It was then discharged at Taylor & Curry's wharf. It was then dry and in good condition. There was about 3,000 bundles of wire, in addition to that which was landed at Tortugas by the Nonpareil, put on the wrecking vessels and brought up to Key West. This 3,000 bales that I speak of, in addition to that which was landed at Tortugas, was dry. I know that this cargo was discharged at Taylor & Curry's wharf. It was dry when put aboard the vessels. I saw a part of this cargo being put into the warehouse after I came up to Key West, and it was dry. Most of this cargo that was taken out was galvanized wire; some of it was painted. I don't suppose over two per cent. was painted. Here and there there was an odd painted bundle. We had no painted wire on the Nonpareil. The remainder of this cargo was brought up in the schooner Benjamin Hale to Key West. It was all taken out of the Benjamin Hale and discharged at Taylor & Curry's wharf. Of these that remained in the vessel, I think about thirty-five or forty per cent. was wet. There was lots of the cargo in amidships and aft, that the water could not get at at all, and some of it was only partially wet. The greater portion of this cargo that had been wet was galvanized wire. Most of the cargo in the vessel was galvanized. I saw all of the cargo after it was landed and stored in Key West, that is, with the
96 exception of a few bales which fell overboard. None of this cargo received any damage after it arrived in Key West.

While I was at Tortugas trying to get the Benjamin Hale off the shoal, it became necessary to jettison a portion of her cargo. We had taken the steam pump off the schooner Cora, and the only place that we could get the suction hose of the pump into was in the main hatch. Before I could get the suction hose into the hatch there was a lot of this hay-binding wire laying right there, and I had to get clear of it. The Cora was alongside the main hatch and her decks were lumbered up and I could not put it aboard of her. I could not bring any vessels alongside at that time to put the wire on, because it was too rough. I had to get the suction hose down and I threw some of this wire overboard. The cargo that I jettisoned was hay bands. I think between eighty and one hundred bundles; I think not more than eighty bundles. This was the only cargo that I know of that was jettisoned at Tortugas. The Benjamin Hale

and the cargo which remained aboard was towed to Key West by the steamtug Clyde. I never had any experience with barbed wire of this class, but I have with ordinary galvanized wire. I suppose that all galvanized wire is about the same thing. I have been in vessels that had galvanized wire rigging for about the last twenty years, and had experience in handling it. From my experience I should consider that the whole cargo of the Benjamin Hale was damaged from fifteen to twenty per cent. in value. I know that this cargo was shipped from Key West in the schooner Cactus, to Velasco, Texas. I did not see it reshipped. I saw the schooner at the wharf and saw them loading her.

Cross-examination by G. BOWNE PATTERSON:

When I went aboard this vessel, aft she was drawing about fifteen feet ten, and forward she was drawing about nine feet, and right abreast the main hatch she was drawing about twelve or twelve and one-half feet of water. The shoal sloped gradually up. This vessel was about a foot and one-half ashore aft. She was buried in the sand about a foot and a half. I thought she was bilged when I got there. I could make no impression on the pumps with the hand force that I had there. When I first sounded the pumps in this vessel abaft of the main hatch near the after-pump wells, I
97 found about twelve and one-half feet of water in her. These were the after-pump wells near the mizzenmast. I could not sound the forward pump or the amidships pump. You could not see the water forward at all, but you could in the main hatch. This twelve foot six is the greatest depth of water that we found in the vessel at any time while ashore. The water could not go any higher in the vessel than it was outside. It went at twelve foot six in at high-water mark. It would ebb and flow in the vessel. I did not take all of the dry cargo out of her that I could before getting her off. When we took cargo out of the vessel before getting her off there was no evidences of that we took out being wet any. From the time that we commenced taking cargo out of the vessel until we floated her was about six days; it might have been six days. Of the three thousand bales of wire that we took out of the Benjamin Hale, in addition to that landed at Tortugas, none of it was wet. The reason that we did not take out any more cargo than this was that when we got the steam pump to work on the vessel we began to shoal the water and found that we could get the vessel off without taking out any more. We put the pump in the main hatch. We could see the water in the main hatch of the vessel when I put the pumps in. The water came up in the main hatch to within the between-deck beams, and gradually grew less as it went forward. We cleared out the main hatch down to the kelson of the vessel to get the pumps down. The first wire that we took out was hay bands. We took out between eighty and one hundred bundles of these, and threw them overboard. We threw them overboard because there was no deck-room to put them on.

This was the only reason for throwing them overboard, because I

had no place to put it; it was partly damaged, and I did not think it was much account either. I was one of the libellants against the schooner Benjamin Hale for salvage, and a witness in the U. S. district court at Key West in the case. I did testify at the hearing of this case of the Benjamin Hale in that court, that the wire that I took out of the hatch and threw overboard I considered utterly worthless, and that it was so rotten that it would break in pieces. I did not throw all of the wire, that I took out of the hatch to clear or the pumps, overboard, only those hay bands. These hay
98 bands were stowed lengthwise in the hatch, and they had sagged down in the water and the ends stuck up. I considered them worthless; where they had touched the water they were rusty, and some of them in the handling broke in two. The other wire, galvanized, that I took out of the main hatch and did not throw overboard, I did not consider very much damaged. I did not notice any marks of rust on this cargo that was taken out of the main hatch, except that *that* I threw overboard. We took the cargo of the vessel after we commenced to put the pumps down, except that included in the three thousand bales that I have testified to. When we floated the vessel the water was about one foot above the kelson when she started to start astern on us.

After we hove the vessel off that night we held her to her anchors, as there was a gale of wind blowing. We held on there till next morning when the steam pump broke down. We kept the water down to within about a foot of the kelson until about four o'clock in the morning, when the pump broke down. We then started the hand pumps, but the water increased to about six feet, and then we got the steam pumps to work again. We pumped her out again until the water was about level with the kelson, until about eleven or twelve o'clock that day, when the pump broke down again. And the pump kept breaking down off and on till the next morning about six o'clock, and the water never got over seven or eight feet deep in the vessel and we never lowered it during that time to more than about within one foot of the kelson. The next morning the pump broke down again, and then the steamtug Clyde came alongside, and there was then about seven or eight feet of water in her hold. We then pumped her out with the Clyde's pump and took her into Tortugas harbor that day. She remained at Tortugas harbor three or four days before we brought her to Key West, and during that time the Clyde would stay alongside of her and pump her when necessary. The greatest depth of water that we had in the vessel at any time after she floated was probably nine or ten feet. The pumps would break down sometimes and the water would increase, and then we would fix pumps and pump her out again. It took about thirty hours from the time we left the wharf at Tortugas to bring the vessel to Key West.

99 Coming up from Tortugas to Key West, when the Benjamin Hale would get about six feet of water we would bring the Clyde alongside and pump her out.

I saw most of the cargo that was taken out of the Benjamin Hale at Key West. I examined it as I saw it coming out, for my own

personal satisfaction. I did not see every package of wire as it came out of the vessel; I saw all of it that came out, but I did not personally examine every bale as it came out. I saw every bundle that went into the warehouse. I did not make a personal examination of each bundle to ascertain the damage that each bundle had sustained. But when the wire was being taken out of the vessel and being put in the warehouse, I was pretty much all the time between the warehouse and the vessel, and those bundles that I did not see come out of the vessel I saw stowed in the warehouse. My examination consisted of looking on when I was on the vessel while the wire has being hoisted out, and of being on the wharf or in the warehouse when it was being stored, where I could see it. I made no examination of that cargo at any time with a view to testifying as to how much damage it had sustained. I first arrived at the opinion that the cargo had received damage from fifteen to twenty per cent. when the salvage that was decreed. I based this opinion on the amount that the judge decreed on the vessel and cargo.

Direct examination resumed:

When I saw the cargo being discharged from the Benjamin Hale while I was on the vessel and on the wharf, I was near enough to see whether it was damaged or not. It was to my interest as a salvor to examine the cargo and see how much it was damaged. When these pumps would break down as I have testified to, and the water would increase in the hold as I have testified, this depth of water would continue in the hold, sometimes longer and sometimes shorter, all the way from one hour and one-half to two hours and a half. She did not leak so badly after she was repaired at Tortugas.

JAMES ST. CLAIR.

100 *Deposition of John Jay Philbrick.*

Taken in Key West, May 21, 1895.

My name is John Jay Philbrick; I am fifty-five years of age; my residence is Key West, Fla.; I am a shipping and commission merchant, and agent of the Southern Pacific Company at Key West, Fla. I remember the schooner Benjamin Hale and cargo. I was appointed by the United States district court as an appraiser in a salvage suit against schooner Benjamin Hale and cargo, for purpose of appraising the schooner Benjamin Hale and cargo, about the sixteenth day of May, A. D. 1893; I, as such appraiser, made a careful examination of the cargo that was ashore. We were the greater part of the forenoon making an examination of the cargo, about three or four hours. The cargo had not all been discharged at that time; there was a small amount left on board the schooner, I do not remember how much now; we were told the amount at the time by the consignee. The cargo consisted largely of barbed-wire fencing; there was a quantity of copper wire also, and a quantity of binding

wire for hay, I mean hay-binders. I did not examine what cargo was left on board the schooner Benjamin Hale. The greater quantity of the cargo consisted of galvanized iron barbed wire. I have never had any experience in buying galvanized iron wire, but have carried in our ships as freight. I use galvanized iron wire as guy wires for electric poles, and as supporting wires for the arc lights in the electric light company. From my experience in use of galvanized wire, and from an examination of the cargo, I would say that the galvanized wire was not damaged materially, and that the painted wire was damaged seriously. The bulk of the damage was in the painted wire; some of the wire was not damaged at all. I should judge that as taking the entire cargo as a whole, that from twenty-five to thirty per cent. would cover the entire damage.

Cross-examination:

I think what use I have had with galvanized wire myself, and what amount of it I have handled for other parties, would enable me to judge fairly of the amount of damage to this cargo. The galvanized wire was stored up in tiers, and the black wire in
101 piles, when I examined it. I examined all the galvanized iron wire that was opened to sight; I walked up and down the tiers. The black wire was piled up in such a way that we could judge very fairly of the quality of it; the other portion of the cargo and more valuable was stored in warehouses. We ascertained the damage of the cargo in the vessel and not discharged, I think, by classing it with the damaged wire on shore. The examination that I made of the cargo was not made for the purpose of determining the damage to the cargo, but for the purpose of determining the then value of the whole cargo.

JOHN JAY PHILBRICK.

Deposition of Peter T. Knight.

Taken in Key West, May 10, 1895.

The said PETER T. KNIGHT, being about the age of forty-three years and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Peter T. Knight, and he did thereupon depose, testify and say as follows, viz: My name is Peter T. Knight; I am forty-three years of age; I reside at Key West, Fla.; I am deputy collector of customs for the port of Key West. About the first day of May, 1893, I arrived at Key West in a tugboat from Fernandina, and heard that the American schooner Benjamin Hale was ashore at Tortugas. I proceeded in said tug to Tortugas seven o'clock the same evening, where I arrived the next morning at daylight; found that the Benjamin Hale had been hauled off of the reef by wreckers, that she had nine feet of water in her hold, and the wreckers could not pump her out and were about to abandon her and let her go back on the reef. I put

steam pump aboard of her and succeeded in freeing her, then towed her into the harbor at Tortugas where we made some temporary repairs, and then towed her to Key West. About 3,000 bundles of wire, I think, or a little more, were discharged from the Benjamin Hale and brought up to Key West in wrecking vessels; the remainder of the cargo was brought up in the schooner and discharged at Key West on Taylor & Curry's wharf. The cargo from
102 the wrecking vessels was also discharged at the same place.

I saw a great deal of the cargo that was taken out of the Benjamin Hale at Tortugas. All of the cargo taken out of the Benjamin Hale before I got there was in good order; there was none taken out before I got there. Some of the cargo that remained in the Benjamin Hale was under water when she arrived at Key West; some of it was dry. I should say that there was a very small portion of the cargo under water when we arrived at Key West, as we had been keeping the pumps up. I think about one-tenth of the cargo that remained in the schooner had been submerged; most of the cargo was galvanized iron wire.

The cargo consisted of galvanized iron wire, painted iron wire, hay-binders, and one large roll of steel wire cable. The cargo brought up to Key West was in good condition; it was not damaged at all. The cargo that was in the Benjamin Hale and had not been submerged was all right, in a good condition. The part that was in good condition was stored in the warehouse; this was dry. The remainder was stored on the grounds of Taylor & Curry on boards; the cargo brought up on the wrecking vessels was stored in the warehouse.

Q. Taking the cargo as a whole, what percentage of loss do you think was sustained by this damage, in value?

A. A liberal estimate would place the damage at from twenty-five per cent. to thirty per cent. I think that this cargo was not damaged in any way after its arrival at Key West; it might have been damaged by handling it, in putting it on board, very slightly. I had contract to stow, to reship this cargo, and handled the whole of it. It was reshipped on the schooner Cactus. I personally superintended the work and handled lots of the bundles of wire myself. I saw it all put on board myself. Key West is not a market for the sale of barbed wire. The cargo left Key West in June, 1893; the cargo when reshipped was apparently in good order. When I say the cargo brought up to Key West was in good condition and not damaged at all, I mean the cargo brought up in the wrecking vessels.

Cross-examination:

The cargo that had been taken out of the Benjamin Hale at Tortugas when I arrived there was in the wrecking vessels. When
103 I say that the hold of the vessel had nine feet of water in her, it was after this cargo in the wrecking vessels had been taken out of her. About one-fifth of the Benjamine Hale's cargo was taken out of her by the wrecking vessels; this was dry cargo. I arrive

at the conclusion that one-tenth of the cargo was submerged, by observation and not by figures.

Q. When you say that twenty-five per cent. or thirty per cent. is a liberal estimate of the damage of the entire cargo, is this based on a careful examination and figures, or is it a mere estimate of yours?

A. It is not based on any figures, but from my knowledge, knowing that galvanized iron does not receive much damage from being submerged for a short time in salt water. I have never had any experience with any cargoes of this kind of wire, but I have had experience with galvanized wire being used on vessels for wire rigging and bobstays for vessels.

PETER T. KNIGHT.

Deposition of Ben. Blum, a Citizen of Galveston, Texas, Witness for Defendant, Taken April 30, 1895.

Q. 1. Are you a member of the firm of Ben. Blum & Company, of Galveston, Texas?

A. I am the senior member of that firm.

Q. 2. Are you in the hardware business?

A. I am.

Q. 3. Please state what experience you have had with barbed wire as a dealer, for how many years have you bought and sold it, and are you familiar with the quality and market price of barbed wire.

A. I have handled barbed wire for ten or eleven years, and I am familiar with the market price of it and quality.

Q. 4. On or about Sept. 20, 1893, did you attend a sale by the United States marshal for the eastern district of Texas, of barbed wire, smooth wire, and staples, at Velasco, in Brazoria county, Texas, discharged by the schooner Cactus?

A. I attended such a sale at that time and at that place, but I cannot tell what schooner discharged it.

Q. 5. Do you, or not, know who purchased said cargo of barbed wire, and if so, was it sold by the ton, or by the reel, or in bulk?

A. I do. It was sold in bulk.

104 Q. 6. Who purchased the cargo of barbed wire? How much money did you pay for the same, and to whom did you make the payment?

A. Ben. Blum & Company purchased said cargo, and paid ten thousand dollars for it to the United States marshal.

Q. 7. Were you familiar with the price of wire in Galveston and Houston on or about Sept. 20, 1893?

A. I was familiar.

Q. 8. What was the market price in Houston and Galveston, if you know, for wire the same as sold, per reel and per ton, in good condition, on or about Sept. 20, 1893?

A. I do not remember accurately, but my best recollection is that it was between $2.40 and $2.75 per one hundred pounds, in car-load lots.

Q. 9. At what average price per pound did you sell the wire above referred to?

A. The average price per pound would be between one cent and one cent and one-half.

Q. 10. How many pounds would the reels above referred to average?

A. From ninety to one hundred and twenty-five pounds each reel.

—. Were there, or not, many bidders at the marshal's sale of said wire at Velasco, Texas?

A. I do not know.

Q. 11. State, if you know, whether or not there were other bids besides your own for said wire at the time of said sale; give the amount of said bids.

A. The bids started at $100 and reached $8,000 before I bid, and after $9,800 had been bid, I bid $10,000 and it was knocked down to me. I did not know at the time the names of any of the bidders.

Q. 12. Do you, or not, know who were the consignees of said cargo of barbed wire, and if yea, give their names and place of residence?

A. I do not know the names of the consignees of said cargo, but the wire was marked, "Washburn and Moen Manufacturing Company, Houston, Texas."

Q. 13. Were you, or not, connected in any way or related in business with the consignees of the said barbed wire?

A. I was not.

Q. 14. Have you, or not, sold said wire, and if so, have you received any complaints as to the quality of said wire, or as to its being damaged, and if so, state the nature of said complaints.

A. We have sold that wire for damaged and have received a great many complaints.

Q. 15. As a practical hardware merchant, are you familiar
105 with the markets in Houston and Galveston for wire same as sold at Velasco, and if so, state whether or not said wire would have sold better at Houston, Texas, than at Velasco, taking into consideration the cost of shipping said barbed wire from Velasco to Houston.

A. I cannot say.

Q. 16. State, if you know, to what extent in percentage was said cargo of wire damaged for practical use when you bought it.

A. I cannot say.

Q. 17. How much profit in round figures did you make on the purchase of said wire?

A. I decline to answer this question.

Q. 18. To what extent, per cent., did the wire become damaged from the time it was landed by the Cactus until it was sold?

A. I did not see it when it was landed and therefore I cannot say.

Cross-examination:

X Q. 19. Did you go to Velasco about the first of September, 1893

for the purpose of examining the cargo of wire which you subsequently purchased?

A. I did.

X Q. 20. State the character of examination you made of the cargo.

A. I made a careful examination of all the goods, spending several hours for that purpose.

X Q. 21. Did you make that examination with a view to ascertaining the amount of the damages to the goods examined, and the market value of the goods in their damaged condition?

A. I did.

X Q. 22. From your examination, please state, in detail, what you considered the amount of damage to the market value of the goods. In other words, what per cent. were the goods damaged in?

A. The barbed wire and the plain wire were damaged from sixty-five to seventy-five per cent. The staples and the wash lines were in good condition. Also wire rope was in good condition. Insulated wire was damaged from fifteen to twenty-five per cent. The hay ties were damaged about ten per cent.; the annealed wire was damaged from sixty to seventy per cent. The total average damage to the cargo I estimate at about seventy to seventy-five per cent.

X Q. 23. What per cent. of the cargo purchased by you have you sold?

A. I don't remember the per cent., but have on hand about two car-loads of the stuff.

106 X Q. 24. Is it not a fact that what is left is very badly damaged?

A. Yes.

X Q. 25. Is it not a fact that you sold the goods as damaged and so represented them to your customers, and sold frequently by sample or on inspection? Explain fully.

A. We sold it for damaged wire or on inspection. We did not sell by sample.

X Q. 26. Did you receive any complaints from your customers to whom you sold the wire, notwithstanding that you represented it as being damaged at the time you sold it?

A. We have.

X Q. 27. Did you receive many complaints or few, and of what character were they?

A. We had lots of them. Some complained of it being rusted; some complained of breakage when being put up, and they complained generally when they came to pay the bill.

X Q. 28. Is there any difference in the market value of goods sold in bulk, of the character and quantity you purchased at the sale heretofore inquired about, and the market value of the same class of goods when sold in small quantities to suit purchasers, and if so, what is the difference; that is, how much do you estimate it, and which sale would be the highest market value?

A. There is a great deal of difference. The higher market is secured when sold in quantities to suit the purchaser.

X Q. 29. At what per cent. of its value, from your experience, do

ou estimate that goods of the character and quantity purchased by ou, can be handled and sold to the trade in quantities to suit the urchaser?

A. A little over twenty-five per cent.

07 EXHIBITS.

EXHIBIT 1.

Cargo. No. 200.

The Reliance Marine Insurance Company, Limited.

Washburn and Moen Mfg. Company, on account of whom it concerns,

n case of loss to be paid to said company, do make insurance nd cause wire to be insured, lost or not lost, at and from Boston to Galveston *and/or* Velasco, upon all kinds of lawful goods and merhandises laden or to be laden on board the good schooner called the Benjamin Hale —— —— whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, rom and immediately following the loading thereof on board of the said vessel, at —— as aforesaid, and so shall continue nd endure until the said goods and merchandises shall be safely anded at —— as aforesaid. And it shall and may be lawful or the said vessel, in her voyage, to proceed and sail to, touch and tay at, any ports or places, if thereunto obliged by stress of weather r other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued (premium included) at sum insured.

Touching the adventures and perils which the said assurers are ontented to bear and take upon themselves in this voyage, subject s hereinafter provided, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of ll kings, princes or people, of what nation, condition or quality oever, barratry of the masters and mariners, and all other perils, osses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be 08 lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and bout the defence, safeguard and recovery of the said goods and merhandises, or any part thereof, without prejudice to this insurance; or shall the acts of the insured or insurers in recovering, saving nd preserving the property insured, in case of disaster, be considred a waiver or an acceptance of an abandonment; to the charges hereof, the said assurers will contribute according to the rate and uantity of the sum herein insured; having been paid the consid-

eration for this insurance, by the assured or — assigns, at and aft
the rate of, as indorsed, one and one-fourth per cent.

The assurers are to be entitled to premiums at their usual rate
all shipments reported or not. It is warranted by the assured
report every shipment on the day of receiving advices thereof, or
soon thereafter as may be practicable, when the rate of premiu
shall be fixed by the assurers.

And in case of loss, such loss to be paid in thirty days after pro
of loss, and proof of interest in the said — (the amount of t
premium, if unpaid, being first deducted), but no partial l
or particular average shall in any case be paid, unless amou
ing to five per cent., provided always, and it is hereby furth
agreed, that if the said assured shall have made any other assura
upon the premises aforesaid, prior in day of date to this policy, th
the said assurers shall be answerable only for so much as the amou
of such prior assurance may be deficient toward fully covering t
premises hereby assured; and the said assurers shall return t
premium upon so much of the sum by them assured as they sh
be by such prior assurance exonerated from. And in case of a
insurance upon the said premises, subsequent in day of date to th
policy, the said assurers shall nevertheless be answerable, subject
hereinafter provided, for the full extent of the sum insured by th
policy, without right to claim contribution from such subseque
assurers, and shall accordingly be entitled to retain the premiu
by them received, in the same manner as if no such subseque
assurance had been made. Other insurance upon the premi
aforesaid, of date the same day as this policy, shall be deem
simultaneous herewith; and the said assurers shall not
109 liable for more than a ratable contribution in the proporti
of the sum by them insured to the aggregate of such sim
taneous insurance. It is also agreed that the property be warrant
by the assured free from charge, damage or loss, which may ar
in consequence of a seizure or detention, for or on account of a
illicit or prohibited trade, or any trade in articles contraband
war.

Warranted not to abandon in case of capture, seizure or det
tion, until after condemnation of the property insured; nor un
ninety days after notice of said condemnation is given to the assure
Also warranted not to abandon in case of blockade, and free fr
any expense in consequence of capture, seizure, detention or bloc
ade, but in the event of a blockade to be at liberty to proceed to
open port and there end the voyage.

And the assurers are contented, and do promise and bind the
selves to the assured, their executors, administrators or assigns,
the true performance of the premises, for the amount herein
sured.

In witness whereof, the undersigned, on behalf of the said
liance Marine Insurance Company, Limited, has hereunto set
hand in New York, the fifteenth day of March, 1893.

MEMORANDUM.—It is also agreed that bar, bundle, rod, h
and sheet iron, wire of all kinds, tin plates, steel, madder, sum

wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy (except caused by actual contact of sea water with the articles
110 damaged), occasioned by sea perils. In case of partial loss by sea, damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandises as far as practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$48,800. Forty-eight thousand eight hundred dollars.

HENRY DESPARD, *Attorney.*

This policy is not valid until countersigned by Edmund A. Poole, agent at Boston.

EDMUND A. POOLE, *Agent.*

(Margin.)

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken, or in case there be none, by the correspondent of the National Board of Marine Underwriters of New York.

Cargo on deck free from claims or loss by wet, breakage, leakage, or exposure.

The assurers not to be liable under this policy for more than $— by any one vessel, at one time, unless otherwise agreed upon at the time of indorsement.

Proof of loss to be authenticated by the agent of the assurers, if there be one at the place such proofs are taken.

Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation or by or from any officer, civil or military, or other person

claiming to act in their name or under their authority, or in their behalf.

111 This policy to be deemed continuous, and to cover as above until discontinued by either party or giving the other — days' notice.

Free of particular average, but liable for absolute total loss of a part if amounting to five (5%) per cent.

Sum insured	$48,800
Premium	616

EXHIBIT 2.

WORCESTER, MASS., *April* 29, 1893.

Edmund A. Poole, Esq., ag't Reliance Insurance Co., Boston, Mass.

DEAR SIR: Understanding that the schooner Benjamin Hale is a total loss, we hereby abandon to the Reliance Insurance Company all right, title, and interest in and to the cargo of wire shipped by her from Boston to Velasco, as per certified invoice and bill of lading enclosed.

Yours truly, WASHBURN & MOEN MFG. CO.

EXHIBIT 3.

WORCESTER, MASS., *April* 29, 1893.

Reliance Insurance Co.—Washburn & Moen Manufacturing Co.

13,051 reels barb. wire, 1,367,870 lbs. at 2.90 cwt.	39,668.23	
641 kegs gal. staples, 64,100 lbs. at 2.60 cwt.	1,666.60	
1,102 bdls. gal. & ann'l'd wire	2,472.22	
1,050 " bale ties	1,600.55	
1 reel gal. wire rope	133.29	
15 bbls. clo. line wire	311.54	
5 reels salamander wire	301.29	
		46,153.72
Add 5%		2,307.68
F'g't from Worcester to ship side		416.34
		48,877.74

Am't covered as per policy, $48,800.00.

112 EXHIBIT 4.

Shipped, in good order and condition, by Washburn & Moen Mfg. Co. on board the good sch. called the Benjamin Hale, whereof John Hall is master for this present voyage, now lying in the port of Boston and bound for Velasco, Texas, to say:

(13,051) thirteen thousand and fifty-one reels of barbed wire.

(1,102) eleven hundred and two bundles of plain wire.

(5) five reels of salamander wire.

(1) one reel of rope.

(1,050) one thousand and fifty bundles of hay bands.
(15) fifteen barrels of wire.
(641) six hundred and forty-one kegs staples.
Weights and contents unknown, not accountable for leakage, breakage, or rust,

Being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of Velasco (the danger of the seas and fire only excepted) unto Washburn & Moen Mfg. Co., Houston, or to assigns, he or they paying freight for the said goods, freight and conditions as per charter-party less (700) seven hundred dollars advanced in Boston with primage and average accustomed.

In witness whereof, the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Boston, March 29, 1893.

JOHN HALL.

(Margin.)

Captain to telegraph to Washburn & Moen Mfg. Co., Houston, Texas, immediately upon arrival of the vessel at Velasco. Weight 710 gross tons.

113 EXHIBIT 5.

5 Papers.

(1.)

WORCESTER, MASS., *March* 15, 1893.

Washburn & Moen Mfg. Co., Houston, Texas, bought of Washburn & Moen Manufacturing Co.

		M.		
3 reels, 4,025 ft.	A # 12	salamander	at $72 per ft.	$289.80
1 " 1,143 ft.	B # 6	"	160 "	182.88
1 " 1,410 "	B # 14	"	50 "	70.50
				$543.18
Less 45 & 2%				251.89
				$291.29
5 reels at $2				10.00
5 reels weight 585 lbs.				$301.29

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

(2.)

MARCH 15, 1893.

Washburn & Moen Mfg. Co., Houston, Texas, bought of Washburn & Moen Mnfg. Co.

1 reel, 1,310 lbs., 1¼ galv. wire rope at 18c. ft., less 45%	$133.29
9 bbls., 2,246 lbs., 20 galv'd C. lines, 90 doz., at $2.10 doz.	189.00
4 bbls., 910 lbs., 18 galv'd C. lines, 19 doz., at $3.41 D.	64.79
2 bbls., 472 lbs., 19 galv'd C. lines, 21 doz., at $2.75 D.	57.75
	$444.83

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN, *Treas.*

114

(3.)

WORCESTER, MASS., *March* 15, '93.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Manufacturing Co.

200 bdl.,	#15	S. eye	bale ties,	8 ft	at $4.27	bdl.			$854.00
300 "	#15	"	"	8 " 3 "	$4.39	"			1,317.00
300 "	#15	"	"	8 " 6 "	$4.51	"			1,353.00
100 "	#16	"	"	8 " 3 "	$4.10	"			410.00
100 "	#16	"	"	8 " 6 "	$4.20	"			420.00
50 "	#16	"	"	9 " "	$4.38	"			219.00
									$4,573.00
Less 65%									2,972.45
									$1,600.55

1,050 bdls. Weight 31,020 lbs.
Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

(4.)

WORCESTER, MASS., *March* 15, 1893.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Manufacturing Co.

13,051 reels, 1,367,870 lbs., barb. fence at $2.90 cwt.	$39,668.23
641 kegs, 64,100 " staples at $2.60 cwt.	1,666.60
	$41,334.83

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

115 (5.)

MARCH 15, 1893.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Mfg. Co.

405 bdls.,	40,414 lbs.,	# 12 galv'd fence at	$2.85 cwt.....	$1,151.79
173 "	10,035 "	14 " " "	2.90 "	291.01
100 "	6,300 "	14 ann'l'd C. "	2.80 "	176.40
200 "	12,600 "	16 " " "	2.80 "	352.80
100 "	6,300 "	15 " " "	2½c. lb.....	157.50
14 "	882 "	18 galv'd C. met. "	4c. lb.. ...	35.28
25 "	1,575 "	19 " " " "	2½c. lb.....	157.50
83 "	5,355 "	15 ann'l'd C. "	$2.80 cwt.....	149.94
				$2,472.22

1,102 bdls.
Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

EXHIBIT 6.

The Reliance Marine Insurance Company (Limited), of Liverpool, England.

BOSTON, MASS., *May* 1, 1893.

The Washburn & Moen Mfg. Co., Worcester, Mass.

GENTLEMEN: Your favor of the 29th ult. at hand with enclosures as stated, contents duly noted, thanks.

I hereby decline to accept the abandonment of the cargo of wire shipped on board schooner Benjamin Hale as tendered in your books of above date.

I await protest for particulars after receipt of which can judge better regarding the loss.

Very truly yours, EDMUND A. POOLE, *Ag't.*

116 EXHIBIT 7.

Fitz Bros. & Co., ship brokers, Boston.

This charter-party, made and concluded upon in the city of Boston the seventh day of March, 1893, between Capt. John Hall of the Sch. Benj. Hale, of Newburyport, of the burthen of 567 tons, or thereabouts, register measurement, now lying in the harbor of Portland of the first part, and Washburn & Moen Manufacturing Co., of Worcester, Mass., of the second part witnesseth:

That the said party of the first part agrees on the freighting and chartering of the whole of the vessel (with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Boston, Mass., to Velasco, Texas, on the terms following: The said vessel shall be tight, staunch, strong, and every — fitted for such a voyage,

and receive the board during the aforesaid voyage, the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel at Mystic wharf, Boston, a full cargo under deck of barbed and plain wire on reels in kegs and barrels, and to pay said party of the first part, or agent, for the use of said vessel during the voyage aforesaid ($2.25) two dollars and twenty-five cents per ton of 2,240 lbs. delivered at railroad wharf, Velasco. It is understood there shall be no wharfage charge to vessel at place of loading at Boston; and that the vessel be in the berth at Mystic wharf to load on or before Tuesday, March 14th, 1893.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the captain reports himself ready to receive or discharge cargo. The vessel to receive quick dispatch loading at Boston and discharging at Velasco.

And that for each and every day's detention by default of said party of the second part, or agent, fifty dollars per day shall be paid by the party of the second part, or agent, to said party of the first part or agent. The cargo or cargoes to be received and de-
117 livered alongside, within reach of the vessel's tackles, and as above, where there is 15 feet of water.

The dangers of the seas mutually excepted.

A commission of 5 per cent. upon the gross amount of this charter, and demurrage, payable by the vessel, is due to Fitz Brothers & Co. upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated amount of this charter; and the vessel holding a lien on the cargo for freight and demurrage.

In witness whereof we hereunto set our hand the day and year above written.

JOHN HALL.
WASHBURN & MOEN MFG. CO.
PHILIP W. MOEN,
Treas. & Gen. Mgr.

Signed in the presence of—
PHILIP FITZ to J. H.

This is a true copy of the original party in our possession.
FITZ BROS. & CO.

EXHIBIT 8.

KEY WEST, FLA., *Ap'l* 24, 1893.

To W. & M.:

Hale ashore Tortugas, full water, badly broken up. Think total loss.

JOHN HALL.

EXHIBIT 9.

STATE OF FLORIDA, } ss:
County of Monroe, }

By this public instrument of protest, be it known unto all whom it may concern that on this 24th day of April, A. D. 1893, before me, Charles J. Curry, a notary public, in and for the county
118 of Monroe, and State of Florida, by letters patent under the great seal of the State, duly commissioned and sworn, personally appeared John Hall, captain of the Am. schooner Benj. Hale, of Newburyport, Mass., of the burthen of 567 tons or thereabouts, and said that she sailed in with said vessel on the 31st day of March last, from the port of Boston, with a cargo of barbed wire, bound to the port of Velasco, Texas. Having in due prosecution of said voyage run ashore on Bird Key shoal, Dry Tortugas, which caused his vessel to bilge. He now enters with me the said notary in due form of law, his protest to serve as occasion may require, reserving to himself the right to extend the same in time and place convenient.

JOHN HALL, *Master.*

In testimony whereof the said master has hereunto subscribed his name, and I, the said notary, have to these presents set my hand and seal of office the day first above written.

CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

STATE OF FLORIDA, } ss:
County of Monroe, }

By this public instrument of protest be it known unto all whom it may concern, that on this 24th day of April, A. D. 1893, before me, Charles J. Curry, a notary public, in and for the county of Monroe and State of Florida, by letters patent under the great seal of the State, personally appeared John Hall, master, T. R. McLaughlin, mate, W. P. Wilson, 2nd mate, John B. Brooks, steward, Nils Johansson, James Gilroy, Fred Cheate and Thomas Mitchell, seamen of the Am. schooner Benj. Hale, of Newburyport, Mass., of the burthen of 567 tons or thereabouts, who being duly sworn severally declared on oath (protest having been duly noted before me on arrival) that they sailed from the port of Boston, on the 31st day of March last laden with a cargo of barbed wire, bound for the port of Velasco, Texas, the vessel being seaworthy with sufficient and necessary provisions for the voyage.

119 March 31st.—At 8 a. m. got under way and proceeded to sea, after which nothing of sufficient importance to note occurred until April 15th, 1893.

April 15th.—At 7.45 a. m. ran aground on small shoal not recorded on the chart, Great Isaacs bearing W. ¼ N. 2 miles, Brother Ledges bearing E. by S. ¾ S. ½ mile; 10 a. m. vessel pounding heavily, so ends this day.

April 16th.—All hands at work heaving over cargo to lighten ship,

jettisoned about 200 reels of wire, at 5 p. m. vessel started and went off. At 6 p. m. rounded the Isaacs and started to beat, lights and pumps attended to.

April 17th.—At 11 a. m. passed Gun cay, 2 p. m. jibbed over and hauled across toward the Florida coast, pumps and lights attended to.

April 18th.—At 9 p. m. sighted Carrysford reefs, at 11 passed the lights, pumps and lights attended.

April 19.—At noon passed Sombrero Key light station, 3 p. m. passed Sand Key light station, 8.30 p. m. passed Rebecca Shoal light station. At 11 p. m. ran ashore on the reefs making W. ¼ S. course from Rebecca Shoal light station by the compass, Dry Tortugas light bearing N. W. ¾ W. Garden key N., and that any loss or damage or injury which has arisen or accrued, or that may accrue or be sustained in any manner whatsoever, is solely owing — the accidents and difficulties herein set forth and declared, and not to any negligence, want of skill, vigilence, or exertion on the part of the deponents or any of the officers or men of said vessel; wherefore the said John Hall, master and commander as aforesaid, has requested me to protest, and I the said notary have protested, and by these presents do publicly and solemnly protest, against all any every person and persons whom it may, doth, shall, or may concern, and against all and singular the accidents, casualties, and circumstances already set forth in the foregoing declaration on oath, for all manner of losses, costs, charges, damages, expenses, and injuries whatsoever, which the said ship, and her cargo on board, and the freight by her earned or to be earned, or either of them, or any part thereof, have already sustained, or may hereafter sustain by reason or means of the foregoing premises.

120 In testimony whereof I have hereunto set my hand and affixed my notarial seal.

CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

JOHN HALL, *Master.*
T. R. McLAUGHLIN, 1*st Mate.*
W. P. WILSON, 2*nd Mate.*
JOHN B. BROOKS, *Steward.*
NILS JOHANSSON, *Seaman.*
JAMES GILROY, *Seaman.*
FRED CHEATE, *Seaman.*
THOMAS MITCHELL, *Seaman.*

EXHIBIT 10.

John S. Emery & Co., ship brokers, 154 State street, Boston.

This charter-party, made and concluded upon in the city of Boston, the 14th day of June, 1893, between James B. Drake, agent, of the schooner Cactus of Bath, of the burthen of 508 tons, or thereabouts, register measurement, now lying in the harbor of Key West, of the first part; and John Hall, master Schr. Benj. Hale, of the second part, witnesseth,

That the said party of the first part agrees on the freighting and chartering of the whole of said vessel (with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables), of sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Key West to Velasco, Texas, on the terms following: The said vessel shall be tight, staunch, strong and every way fitted for such a voyage, and receive on board during the aforesaid voyage, the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel a cargo consisting of not less than 600 tons gross weight of barbed or smooth wire, and to pay to the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid two dollars and twenty-five cents ($2.25) per ton of 2,240 lbs. delivered freight pay-
121 able in cash upon delivery of cargo. Charterers are to load, stow, and discharge the cargo at their expense, also to pay vessel's wharfage at Key West if any while loading. It is understood that this cargo is from the abandoned Schr. Benj. Hale and is to be taken in the condition which it is, and Schr. Cactus is not accountable for any damage the wire may have sustained.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the captain reports his vessel ready to receive or discharge cargo, charterers to have seven running days, Sundays excepted, to load vessel at Key West and five running days, Sundays and legal holidays excepted, to discharge at Velasco.

And that for each and every day's detention by default of said party of the second part, or agent, fifty dollars per day shall be paid by said party of the second part, or agent, to said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of vessel's tackles.

The dangers of the seas mutually excepted.

A commission of 5 per cent. upon the gross amount of this charter, and demurrage, payable by said vessel, is due to John S. Emery & Co., upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel's freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated amount of this charter; and the vessel holding a lien upon the cargo for freight and demurrage.

In witness whereof we hereunto set our hands the day and year above written.

Signed in the presence of—

JAMES B. DRAKE,
Agent for Owners of Sch. Cactus.
JOHN HALL,
Master Sch. Benj. Hale.

This is a true copy of the original charter-party in our possession.
JOHN S. EMERY & CO.

122 EXHIBIT 11.

Sch. Benj. Hale, owners and underwriters, to Wm. Curry, Dr.

To wharfage as follows:

"	12,625 reels barb wire,	33,140 cu. ft., at 2c	$662.80
"	1,146 " plain "	1,528 cu. ft., " "	30.56
"	249 kegs staples, 249	" " " "	4.98
"	5 reels wire rubber, 15	" " " "	.30
"	1 large reel wire rope, 48	" " " "	.96
"	478 bdls. hay straps, 130	" " " "	2.60
"	15 " wire, 75	" " " "	1.50
			$703.70
Material			25.00
			$728.70

Key West, Fla., May 18, 1893.

Rec'd payment,

WM. CURRY,
By C.
JOHN HALL, *Master.*

EXHIBIT No. 12.

badly Dam painted	840	Dam plain	66
Dry "	38	(Annealed)	
Dam barbed	10,448	" tel	572
(hardly perceptible)		Dry "	464
Dry "	951		
	12,277		1,102
B/L. 15 not hurt	13,051		1,102
Bbls. were.	Reels barbed wire.		Bbls. plain wire.

					Badly
Gal. wire	5	Rope	1	Dam keg	6
Dry salamander.		All right.		Dry "	243
	5				249
	5		1		641
	Gal. wire.		Rope wire.		Kegs staples.

Hay bands.	478
	478
	1,050
	Hay band.

123 *Manifest.*

MEMO.—One car-load staples not shipped (got to wharf too late) which probably accounts for difference.

JOHN HALL.

EXHIBIT 13.

KEY WEST, FLA., 7, 1, '93.

Washburn & Moen Mfg. Co., Houston, Tex.

GENTLEMEN: I have been directed by the National Board of Underwriters of New York to forward to you the enclosed b. l. of cargo schooner Cactus, same having greater portion cargo of wrecked schooner Benjamin Hale.

Kindly acknowledge receipt and oblige,

Respectfully, MASON J. MORENO,
Ag't for Underwriters.

EXHIBIT 14.

WORCESTER, MASS., *June* 11, 1895.

Messrs. Carver & Blodgett, 28 State St., Boston, Mass.

DEAR SIRS: The total number of reels of barbed wire shipped by the Benj. Hale was 13,051. Of this, 11,775 were galvanized barbed wire, and 1,276 reels were painted barbed wire. No japanned wire was shipped.

The price of $2.90 was the average price of the two kinds, the price of the galvanized being 3 cents per pound, and of the painted 2½ cents per pound f. o. b. cars Worcester.

Yours truly, WASHBURN & MOEN MFG. CO.
WM. E. RICE, *President.*

124 EXHIBIT 17.

Sch. Benj. Hale & cargo.

Wason J. Morend, act'g ag't underwriters, in acc't with Nat'l Board Underwriters.

1893.		DR.	CR.
June 24.	To this am't rec'd from J. Raymond Smith & Co.....	$1,190.00	
" "	By paid bank commission....	.....	5.95
	" " United States admiralty court as per court record.....	.....	1,100.00
	By d'ft favor of J. Raymond Smith sec. nat'l board	.....	84.05
		$1,190.00	$1,190.00

E. & O. E.

WASON J. MOREND,
Act'g Ag't Underwriters.

Key West, Fla., 7, 5, '93.

What marine board paid on account of cargo to reimburse Capt. Hannah. Paid in addition to that, paid into court $10.00 per day from May 9th to June 3rd, 1893, inclusive. Living expenses $6 per day for some time. Travelling expenses $42.50 each way.

25 days at $16	$400
Travel	85
Total	$485

EXHIBIT 18.

Shipped by Capt. John Hall, master of Am. Schr. Benjamin Hale, on board the schooner called the Cactus, whereof L. S. Wiley is master, now lying in the port of Key West, and bound for Velasco, Tex. To say:

12,625 reels barbed wire.	478 bdls. hay bands.
1,146 bdls. plain "	15 bbls. wire.
249 kegs staples.	1 large reel wire rope.
5 reels wire rubber.	

Weights and contents unknown, not accountable for leakage, breakage and rust. It is understood this cargo is from the
125 wrecked Sch. Benj. Hale and is to be taken in the condition in which it is; said Sch. Cactus is not accountable for any damage the wire may have sustained, same being greater portion of original cargo of wrecked Sch. Benj. Hale, being marked and numbered as in the margin, and are to be delivered in like condition, at the aforesaid port of Velasco, Texas, (the dangers of the seas only excepted) unto Washburn & Moen Mftg. — or to their assigns, he or they paying freight for the said cargo and all other conditions as per charter-party. Dated at Boston 14 June, 1893, without primage and average accustomed.

In witness whereof, the master or purser hath affirmed to 4 bills of lading, all of this tenor and date; one of which being accomplished the others to stand void. Dated at Key West, the 28 day of June, 1893.

L. S. WILEY,
Master Schr. Cactus.

Vessel reported ready Friday, June 16th, at noon, and loaded June 28 at night, $175 is due Schr. Cactus for demurrage at this port as per charter-party.

CAPT. JOHN HALL,
C. o. W. J. TAYLOR,
Att'y in-fact.

Captain to telegraph to Washburn & Moen Mfg. Co., Houston Texas, immediately upon arrival of vessel at Velasco.

EXHIBIT 19.

June 13, '95.

Circuit Court of the United States for the District of Massachusetts.

WASHBURN & MOEN MANUFACTURING CO.
v.
THE RELIANCE MARINE INSURANCE CO.

JUNE, 1895.

Stipulation.

It is hereby agreed that I, L. S. Wiley, formerly master of the American schooner Cactus, if called, would testify as follows:
126 On the 28th of June, 1893, I sailed on board the Cactus from Key West, Florida, for Velasco, Texas, with a cargo of six hundred and sixty-six tons of barbed and smooth wire and staples, more or less, which was loaded at Key West, and was formerly on board the schooner Benjamin Hale; that I duly arrived at the port of Velasco on the 14th day of July, 1893, but that the Washburn and Moen Manufacturing Company refused to receive the same; that upon the 1st day of August I commenced to discharge said cargo at Velasco, completing the discharge on the 5th of August; that from said 5th of August, until the cargo was sold on the 20th day of September, under orders of the United States court, while a part of the cargo consisting of smooth wire and staples were placed in a warehouse, the balance lay upon the ground at said Velasco, at a place not upon the wharf, but upon skids on the ground some three hundred feet from the ship across the railroad track, subject to the action of the weather and such damage as might be caused by exposure, the said Washburn and Moen Manufacturing Company refusing to receive said cargo, and the agent of the Reliance Marine Insurance Company telling me that the "consignees are in error, look to them and the cargo." Velasco, Texas, was at that time a new port, and there were no warehouses there except the one belonging to the Brazos River Dock Company, and said cargo was stored on private property near the river bank, under a grove of trees.

CARVER & BLODGETT,
Att'ys for Plaintiff.
LOWELL, STIMSON & LOWELL.

EXHIBIT 20.

To the Hon. David E. Bryant, judge of the district court of the United States for the eastern district of Texas:

In the matter of the libel of L. S. Wiley *et al.* against 666 tons of barbed and smooth wire and staples numbered 654 A. D. upon the docket of said court, the said wire and staples being the cargo of the schooner Cactus, libelled for freight, demurrage and expenses,

the libellant respectfully represents to the honorable court
127 that the said 666 tons of wire and staples has been seized by the United States marshal for said district in pursuance of writ issued from said court, and *is* now in his possession at Velasco, Texas.

That monition has been published according to law citing all parties interested in said cargo of wire and staples to appear before said court in Galveston, Texas, on the 28th day of August, 1893, and answer libellant's bill, but there being no answer filed, libellant respectfully represents that the greater portion of said 666 tons of barbed and smooth wire and staples is exposed to the weather, there being no warehouse at Velasco in which to store the same. That it is damaging from said exposure, and deteriorating in value from rust, and that the cost of keeper and dock expenses is accumulating against said cargo.

Wherefore libellant prays that an order of sale issue, and after giving ten days' notice of same by publication, the marshal sell said 666 tons of barbed wire and staples according to law at Velasco, Texas, and that the proceeds of said sale be brought into court to await adjudication.

J. B. SHEA,
Proctor for Libellant.

Subscribed and sworn to before me, the undersigned authority, this 5th day of September, A. D. 1893.

JNO. A. WILKINS,
Notary Public, Brazoria Co., Texas.

EXHIBIT 21.

JULY 19TH, 1893.

George A. Cragin, Esq., agent Washburn Moen Mfg. Co., Houston, Texas.

DEAR SIR: Confirming telephonic conversation of this morning in which you informed me your company declares that it wishes to abandon the cargo of wire, etc, originally shipped on the schooner Benjamin Hale but now on board Sch. Cactus at Velasco, I would state that under the terms of the policy of insurance covering the said cargo, the underwriters are liable only for the value of such part of the cargo as has actually been lost from the vessel, and then only provided such portion amounts to 5 % of the entire
128 shipment hence inasmuch as the identical cargo of the Sch. Benjamin Hale is now at Velasco and has been tendered to you by the carrier, I would ask upon what grounds your company wishes to abandon the cargo. Please observe that the Reliance Marine Insurance Company, Ltd., are prepared to receive your claim for such portion of the cargo as has been actually lost on the voyage (provided of course that such portion amounts to five or more per cent. of the whole) and are willing to attend any survey you may call upon the cargo, but that under the terms of the policy, you are not justified in expecting the company to take over the cargo and pay you for it, and that the company declines to do this.

Also please note that all expenses, demurrage and other charges curred by your refusing to receive the cargo when tendered will for your account and risk and that the Reliance Marine Insur-ce Company, Ltd., will not hold itself responsible for any such sts.

Yours very faithfully, JAS. MOLLER, *Agent.*

This being all of the material evidence in the case, at the close the evidence in the case the plaintiff made the following with her requests for rulings, which are herewith given in the original mbers.

3. That it is a question of fact for the jury as to whether there ere such acts or instructions given by the defendant, its servants agents, as amounted to an acceptance of the abandonment.

4. An abandonment, even though at first refused, may be ac-pted by reason of delay in the forwarding of the cargo, or by ex-cising any acts of ownership or direction in relation to the same, by reason of failure to discharge a burden or lien which has risen by reason of perils insured against or by the acts or direction the defendant.

5. That the sale of the cargo at Velasco, Texas, under judicial rocess deprived the plaintiff of the property and made the loss a tal one, provided the suit which was brought, under which the rgo was attached, was larger in amount than the original freight by the schooner Benjamin Hale.

29 6. "An offered abandonment may be accepted even when the assured has no right to abandon, and, if accepted, it must e with its consequences; and an acceptance need not be expressly ade. It may even be refused, and yet the insurers by their con-uct may make themselves liable for a total loss."

Which the court ruled did not apply to the case at bar.

9. That if the cargo insured upon its arrival at the port of Velasco, exas, was of no commercial value for the purpose intended, then e plaintiff is entitled to recover for a total loss under the policy.

10. That the sale of the cargo at Velasco, Texas, under judicial rocess deprived the plaintiff of the property and made the loss a tal one.

11. That if, by reason of perils insured against, there was damage f loss to the property insured in excess of fifty per cent. of its value s given in the policy, and an abandonment was duly made before e property was in a place of safety, then the plaintiff can recover total loss.

12. That if, by reason of the perils insured against, the property sured is injured, and the cost of saving the same, together with e costs incident to the saving and the costs of forwarding the same the port of destination, amount to more than the value of the roperty insured at its arrival at the port of destination, then the laintiff can recover a total loss provided there is a seasonable bandonment.

14. That on all the evidence in the case, the court should order

a verdict for the plaintiff for the amount sued for, with interest from May 29, 1893.

15. That the jury shall find that the value of the goods shipped on board the schooner Benjamin Hale was forty-eight thousand eight hundred dollars ($48,800) for all the purposes of this case.

The court declined to give any of the above requests for rulings made by the plaintiff, and ruled that there was no evidence in the case that would warrant a jury in finding either an actual total loss or a constructive total loss, except an actual total loss of a minor part of the cargo referred to elsewhere, and that there was no evi-
dence that would warrant a jury in finding that there had
130 been an acceptance of the abandonment made by the plain-
tiff company. The court therefore duly made a charge to the jury giving his reasons therefor, which charge and reasons are made a part of this record, the court ruling that there could be a recovery only for a total loss of a part.

The plaintiff noted exceptions to the following portions of the charge and instructions at the time the same was made:

To the part of the charge and rulings which states that this court is not bound by the construction of this contract of marine insurance as given by the supreme court of the State of Massachusetts, although the contract was made in Massachusetts, and the suit was originally brought in the State court for said State; the plaintiff contending that the construction of the contract as given by the highest court in the State should govern in the case at bar and that this court is bound by such decisions.

To the part of the charge and rulings of the court which states that the articles insured under this policy were what is known as memorandum articles.

To the part of the charge and rulings of the court which holds in the case at bar that there is no evidence which warrants the jury in finding that there was in this case an actual total loss.

To the part of the charge and rulings that the defendant under this policy was not liable for a constructive total loss of the property insured.

To that part of the charge and rulings which states that there was no evidence that would warrant the jury in finding that there was an acceptance of the abandonment.

To that part of the charge and rulings which states that the transshipment of the cargo at Key West by the underwriters did not warrant the jury in finding that there was an acceptance of the abandonment.

To the part of the charge and rulings of the court which states that there was no evidence of delay at Key West that would warrant the jury in finding an acceptance of the abandonment.

To the part of the charge and rulings of the court which states that the difference in extra charges between the charter of the
schooner Cactus and the schooner Benjamin Hale had no
131 effect as to any abandonment and could not be considered by the jury in this case.

To the general charge and ruling of the court that the plaintiff

under this policy was not entitled to recover for a total loss; and to the refusal of the court to submit that question to the jury on which to found a general verdict.

The court ruled that there could be a recovery only for a total loss of a part, which question was submitted to the jury, and found a verdict thereupon by agreement in the sum of twenty-five hundred dollars ($2,500).

The court further ruled that there was a sufficient abandonment and sufficient evidence to warrant the jury in finding that there was a constructive total loss of the said cargo, but for the clause in the policy "free of particular average" and the memorandum clause; and the jury found as a special finding that there was a constructive total loss of the cargo. To the said charge and instructions of the court to the jury the plaintiff, at the time of the said charge made the following exceptions and rulings:

To all of the said requests for ruling and exceptions, the plaintiff having duly excepted to the general ruling that the plaintiff could not recover for a total loss, the said exceptions were duly allowed by the court.

The plaintiff, being aggrieved by said orders, instructions and rulings of the court, excepts thereto and prays that its exceptions may be allowed, as of the time of the trial of the cause.

By EUGENE P. CARVER,
EDWARD E. BLODGETT,
Its Attorneys.

October 2, 1895.

We have seen the foregoing bill of exceptions and have no suggestions to make.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

Said exceptions being proved to be true are allowed as of the day of the trial and before the verdict of the jury was rendered.

In witness whereof, I have hereunto set my hand this second day of October, A. D. 1895.

W. L. PUTNAM,
Circuit Judge.

132 *Defendant's Exceptions.*

(Filed and allowed Oct. 2, 1895.)

For the facts, proceedings and evidence in the above case, reference may be made to the plaintiff's bill of exceptions on file therein.

Concerning the special finding of the jury, to wit, that if the defendant was liable under the terms of the policy for a constructive total loss, then the evidence in the case showed that such a constructive total loss had been suffered, the defendant, after the taking of testimony had been concluded and before the judge's charge, duly presented to the court the following requests for rulings:

First. That the abandonment made by the plaintiff to the defend-

ant was insufficient, and that the jury should, therefore, find for the defendant.

Second. That if the plaintiff be entitled to recover for a constructive total loss, in estimating the same he is not to be allowed to deduct from the gross value of the damaged cargo any charges for salvage expenses paid by the defendant.

Third. That if the plaintiff be entitled to recover for a constructive total loss, in estimating the same he should not be allowed to deduct from the gross value of the cargo any general average charges.

The judge refused to give the rulings asked for, but instructed the jury as appears in the charge set forth in the bill of exceptions. He also instructed the jury that in computing a constructive total loss the jury should charge against the gross value of the cargo damaged all salvage expenses and general average charges paid by the defendant. Under these instructions the jury found specially that there was a constructive total loss.

To the said charges, instructions and rulings of the court the defendant duly noted the following exceptions:

First. To the direction of the judge to the jury as to the sufficiency of the notice of abandonment of the goods insured.

Second. To the direction of the judge to the jury that in computing a constructive total loss they should charge against the gross value of the cargo as damaged any salvage expenses paid by the defendant.

133 *Third.* To the direction of the judge to the jury that in computing a constructive total loss they should charge against the gross value of the cargo as damaged any general average charges paid by the defendant.

The defendant, being aggrieved by the said orders, instructions and rulings, excepts thereto, and prays that its exceptions may be allowed.

RELIANCE MARINE INSURANCE COMPANY,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

October 2, 1895.—Allowed.
W. L. PUTNAM,
Circuit Judge.

It is thereupon, to wit, Oct. 2, 1895, considered by the court, the Honorable William L. Putnam, circuit judge, sitting, that The Washburn and Moen Manufacturing Company, plaintiff, recover of the said The Reliance Marine Insurance Company, defendant, the sum of two thousand five hundred forty-five dollars damages, and its costs of suit taxed at —.

A true record.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

Plaintiff's Assignment of Errors and Prayer for Reversal.

(Filed Oct. 18, 1895.)

And now comes the plaintiff in the above-entitled action and says that in the judgment, decree and findings therein there is manifest error, to wit:

First. In not allowing the case to go to the jury on the question as to whether or not there was a constructive total loss.

Second. In not allowing the case to go to the jury on the question as to whether or not there was an absolute total loss.

Third. That the court erred in not ruling that it was a question of fact for the jury as to whether there were such acts done and instructions given by the defendant, its servants and agents, as amounted to an acceptance of the abandonment.

Fourth. That the court should have ordered on the whole
134 evidence in the case a verdict for the plaintiff for the amount sued for.

Fifth. That the court should have ruled that the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property and made a total loss of the cargo under the policy.

Sixth. That the court should have ruled that if by reason of the perils insured against there was damage or loss to the property insured in excess of fifty per cent. of its value as given in the policy, and that an abandonment was duly made before the property was in a place of safety, the plaintiff could recover a total loss.

Seventh. That the court erred in not allowing the said case to go to the jury on the question as to whether or not there was a total loss either absolute or constructive.

Eighth. That the court erred in not allowing the case to go to the jury on the question as to whether or not the defendant had accepted the abandonment of the cargo made by the plaintiff.

And the plaintiff prays that the said judgment, decree and verdict may be annulled, reversed and held for naught, and that it may be restored to all things which it has lost by reason of said judgment and decree, and that it may be entitled to a new trial in the aforesaid cause, and that the aforesaid judgment and verdict may be reversed.

THE WASHBURN AND MOEN MANUFACTURING CO.,
By EUGENE P. CARVER, *Its Attorney.*

Defendant's Assignment of Errors and Prayer for Reversal.

(Filed Oct. 24, 1895.)

And now comes the defendant in the above-entitled action, and says that in the judgment, decree and findings concerning the special finding of the jury therein, there is manifest error, to wit:

First. That the court erred in holding that there was a sufficient abandonment by the plaintiff to the defendant.

Second. That the court erred in directing the jury that in com
puting a constructive total loss they should charge against th
135 gross value of the cargo as damaged any salvage expens
paid by the defendant.

Third. That the court erred in directing the jury that in compu
ing a constructive total loss, they should charge against the gro
value of the cargo as damaged any general average charges paid b
the defendant.

And the defendant prays that the said special finding and verdi
may be annulled, revoked and held for naught.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

(MEMORANDUM.—On the eighteenth day of November, A. I
1895, the defendant filed a waiver of all bonds and stipulations o
writ of error. On the twenty-fourth day of November, A. D. 189
the plaintiff filed a waiver of all bonds and stipulations on writ
error. Alex. H. Trowbridge, clerk.)

Citation on Writ of Error in No. 156.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Reliance Marine Insu
ance Company, Greeting:

You are hereby cited and admonished to be and appear in th
United States circuit court of appeals for the first circuit, in th
city of Boston, Mass., on the twenty-fifth day of November, curren
pursuant to a writ of error filed in the clerk's office of the circu
— of the United States, for the district of Massachusetts, wherein Th
Washburn and Moen Manufacturing Company, plaintiff, is plainti
in error, and you are defendant in error to show cause, if any the
be, why the judgment rendered against the said plaintiff in erro
as in the said writ of error mentioned, should not be corrected an
why speedy justice should not be done to the parties in that behal

Witness, the Honorable William L. Putnam, judge of the circu
court of the United States for the district of Massachusetts, thi
eighteenth day of November, in the year of our Lord one thousan
eight hundred and ninety-five.

WILLIAM L. PUTNAM,
United States Circuit Judge.

BOSTON, *Nov.* 19, 1895.

Service of the within citation is acknowledged.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

136 *Citation on Writ of Error in No.* 157.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Washburn and Moen Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the twenty-fifth day of November, current, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein The Reliance Marine Insurance Company, defendant, is plaintiff in error, and you are defendant in error, to show cause, if any there be why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William L. Putnam, judge of the circuit court of the United States, for the district of Massachusetts, this eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

WILLIAM L. PUTNAM,
United States Circuit Judge.

BOSTON, *Nov.* 19, 1895.

Service of the within citation is acknowledged.

CARVER & BLODGETT,
Attorneys for Washburn & Moen Mfg. Co.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled,

WASHBURN AND MOEN MANUFACTURING Company, Plaintiff, v. THE RELIANCE MARINE INSURANCE COMPANY, Defendant.	No. 356, Law Docket.

in said circuit court determined, the assignments of errors and prayers for reversal, and also the original citations upon the
137 writs of error issued in said cause, with acknowledgments of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

Agreement.

(Filed in circuit court of appeals Dec. 16, 1895.)

It is hereby agreed that annexed hereto is a true copy of the charge to the jury and the reasons therefor, which are made a part of the bill of exceptions. (See lines 2 and 3 of page 130 of the printed record herein.)

The said copy annexed may be used in this court of appeals as if the same were annexed to the plaintiff's bill of exceptions and made a part thereof.

CARVER & BLODGETT,
Attorneys for Washburn & Moen Mfg. Co.
LOWELL, STIMSON & LOWELL,
Attorneys for Reliance Marine Ins. Co.

Charge to Jury, June 14, 1895.

PUTNAM, *J.*:

I will give counsel my views about this case. I desire to simplify, as much as possible, the questions that go to the jury. This was undoubtedly, a Massachusetts contract. It was delivered in this State by the agent of the defendant company, and, clearly, it is within *Equitable Life Assurance Society v. Clements*, 140 U. S., 226.

So far, therefore, as any local usages which have become a part of the subject-matter of underwriting marine risks in Massachusetts are concerned, this court would be bound to adopt the law as established by the decisions of the State court; yet, so far as a question comes up which is not one of mere local usage, but of general law, or a question of the interpretation of a commercial instrument, like a policy of insurance, although what we are seeking to
138 discover is, of course, the law in Massachusetts, yet, nevertheless, we are not governed by the decisions of the courts of Massachusetts, but by those of the Supreme Court of the United States, so far as we can find decisions bearing on the questions involved, and, so far as we do not find them, then by the general trend of authority.

I do not understand that under the Constitution and laws of the United States we are entitled to reject the law of Massachusetts with reference to this policy, but we are not in this case bound to follow the decisions of the courts of Massachusetts in ascertaining what the law of Massachusetts is. Therefore, in passing upon the principal question in this case, that is, whether this phrase, "free of particular average," covers a constructive total loss, I am bound to follow the decisions of the Supreme Court of the United States; and if I do not find such decisions, then I am bound to follow the general trend of authority.

There have been cited to me two cases,—*Marcadier v. Chesapeake Insurance Company*, 8 Cranch, 39, and *Morean v. United States Insurance Company*, 1 Wheaton, 219,—where it was held, directly and positively, that the underwriters are not liable for a constructive

total loss on articles contained in the usual memorandum clause. So far as counsel have been able to inform me, and so far as I have been able to find, the Supreme Court has never modified the position which it took in those two cases. It apparently approved it in *Hugg v. Insurance Co.*, 7 Howard, 605. The rule is an exceptional one, and against the general principles of underwriting. Nevertheless, there are these decisions of the Supreme Court, which never have been modified by that court, as far as I can find.

I thought it possible that these cases might have been decided before the doctrine of constructive total loss, as applied to cargoes, had been fully developed in this country. But I find it is not so, because in those cases that doctrine was fully elaborated, and the origin of it in the ancient maritime law recognized; so there is no change in the general law of marine insurance, so far as I can discover, which renders those decisions inapplicable at the present time.

Not only have those decisions been the law as established by the Supreme Court, but they have been recognized as such by all
139 text-book writers in the United States, so far as I can discover. Phillips on Insurance, which I regard as the most useful and reliable work on insurance which comes to hand in this country, sections 1615 and 1767, edition of 1867, lays down the rule positively, as given by the Supreme Court of the United States. Strange to say, in this last edition, the author takes no notice whatever of the Massachusetts cases, so far as I can find.

The rule was so recognized in Maine by Chief Justice Shepley, who, as judge and as lawyer, to my personal knowledge, had a large practical knowledge of marine insurance. This was in 1850, in *Williams v. Kennebec Insurance Company*, 31 Maine, 455. It is there accepted as the undoubted rule.

The plaintiff relies on *Kettell v. Alliance Insurance Company*, 10 Gray, 144, and *Mayo v. India Mutual Insurance Company*, 152 Mass., 172. The line of reasoning in these cases is entirely unsatisfactory. Perhaps it seems absurd for this court to question Chief Justice Shaw's line of reasoning, but even Homer sometimes nodded. If he had followed out the line of reasoning which he evidently started upon, that is, had attacked the entire doctrine found in the decisions of the Supreme Court of the United States, as contrary to the underlying rules with regard to the construction of marine policies, and had repudiated those cases entirely, there would be some very strong reasons in that behalf. But instead of doing this he undertook to make a distinction between the articles found in the memorandum clause proper, and articles found in a rider. So far as I can see, there is no reason in it. But, however that may be, I am bound by the broad rule laid down by the Supreme Court of the United States. Moreover, the policy in issue in this case meets the supreme court of Massachusetts fully, so far as that court has actually decided the question. That court undertook to make a distinction between the articles found in a memorandum clause proper and articles in a rider, but the policy at bar shows the subject-matter of this suit to be covered into the memorandum clause itself.

It is true that it is not clear that every article of the invoice in suit was covered by the memorandum clause. It enumerates only wire and steel; but any doubt is met by the rider, which obviates any question of that sort. For this case the rider is evi-
140 dently *in pari materia* with the memorandum clause, and must bear the same construction.

Therefore I shall instruct the jury that there can be no recovery in this case except for actual total loss.

Now, then, comes the question of the transshipment by the underwriters of this cargo from Key West to Velasco. The cargo was in entire safety at Key West; it was at a place where it could have been sold; it was within the reach of the owners, by telegraph and otherwise; and the question arises whether the underwriters, by meddling with the cargo at Key West, and transshipping it to Velasco, made themselves liable either by what may be regarded as an acceptance of an abandonment, or by a conversion of the property, in such a way as to make themselves liable therefor as underwriters.

I apply to this case, in its fullest length and breadth, what was said by this court in the case of *Monroe v. Insurance Company*, 52 Fed. Rep., 777, as follows:

"Undoubtedly the underwriters may so deal with property in peril as to convert what otherwise would be a partial loss into an absolute total one, or so as to bar themselves from denying that such a loss has accrued. But when the assured has obtained the benefit of a low premium by covering absolute total loss only, then in view thereof, and also in view of the fact that public policy requires that all interests should be encouraged to use the sue and labor or rescue clauses to the fullest extent, whatever may be done in that direction by the underwriters, as well as by the owners, in unintentional excess of power, should not be made a trap."

I have already remarked that in my view the sue and labor clause today, except so far as it enables the assured to charge the underwriters for the expenses incurred under it, amounts only to what the courts would now declare as a principle of the common law.

In determining whether or not the underwriters have made themselves liable for a total loss, when not so by the terms of the policy, by reason of their conduct with reference to the property insured, we must look at the circumstances and judge of them according to the fundamental rules of law. In cases where the underwriters may be holden for a constructive total loss, and the question is simply one of computation, or one of circumstances about which there could be a great variety of opinions or great doubts, very
141 slight circumstances may be sufficient to authorize a jury or a court to say that the underwriters have accepted an abandonment.

Many cases occur where the underwriters would not be strictly liable on a final adjustment, but for the interests of themselves, or in order to avoid doubtful litigation, they step in, and, by their own acts, or expressly, accept an abandonment, which, perhaps, they could not be compelled to accept. In a case of that sort, where the

underwriters may be holden for a constructive total loss, very slight circumstances may be taken as evidence that they have accepted an abandonment, because both parties are entitled to know what their respective positions and rights are, and know it early. Each party has a duty to perform, and so long as there is a question it ought to be determined, and therefore the courts of law scrutinize closely and critically, under those circumstances, the conduct of the underwriters, not only for the purpose of determining whether they have actually accepted the abandonment, but also whether they have so conducted themselves that the assured has a right to assume an acceptance.

But, in a case where there can be no liability for a constructive total loss, and no abandonment which will be of any value, the case is very different. Such a case requires a clear and strong presumption to induce the court to hold, or to allow a jury to hold, that the underwriters have voluntarily converted into a total loss a loss which they otherwise would not be liable for, especially when, as in this case, the underwriters have promptly and distinctly notified the assured that they do not accept the abandonment, so that the assured knows the position of the underwriters from the outset.

Therefore, as it appeared in this case that the defendants are liable for nothing except for absolute total loss, that they took that position from the outset, that they from the outset denied their liability for a total loss, I cannot allow the jury to pass on the question whether, on the facts proven, the underwriters, by transshipping this property to Velasco, made themselves liable for a total loss, when they otherwise would not have been; and I apply to the case, in the fullest breadth, the extract which I have already read from *Monroe v. Insurance Company*. I say this independently of the question whether or not the underwriters had a right,
142 under the circumstances, to make the transshipment, and because everything in the case shows that the transshipment, by whomsoever made,—and I think it was the underwriters who made it, the master had no right to transship,—by whomsoever made, it was done in good faith, and it did not prejudice its owner.

The testimony in behalf of the plaintiff shows that there was no market for this merchandise at Key West, but that there was at Velasco, and not only a market there, but Mr. Rice himself testified that Texas was the best market they had. Everything connected with this matter goes to show that the underwriters acted in good faith in making the transshipment, and, also, that there was nothing done by them to prejudice the interests of the owners of the cargo.

Therefore, if they exceeded their rights in the matter, I do not regard it as any evidence whatever of an intention on their part to accept the property, and certainly I cannot regard it as sufficient to enable me to say, as a matter of law, or to authorize the jury to say as a matter of fact, that the underwriters, by that transaction, against their declared and evident intention, did accept the property and make themselves liable for it as underwriters. Whether they made themselves liable for it as tort-feasors is another ques-

tion, which we have nothing to do with. But if those authorities are correct which hold that the question of a constructive total loss or an absolute total loss should be judged by the condition of things as it may actually exist at the original port of destination, then the underwriters had a clear right to transship this cargo to protect themselves against the rules which those authorities lay down.

However, without going into that, I am satisfied that the mere fact of transshipment, even if in making the transshipment the underwriters exceeded their power, does not, under the circumstances, cast upon them, as underwriters, a liability for a total loss.

It is said that there was some delay at Key West. I see no evidence here to go to the jury of any delay of a substantial or injurious character, which would justify me in changing the rule which I have stated with reference to the mere fact of transshipment. I doubt very much whether a jury would be justified in finding that there was any unreasonable delay whatever; but there was none of an injurious character, certainly, and none of which any
143 complaint was made, so far as this case goes, until it came to trial. This matter, with many other matters in the case, on both sides, as the Federal courts now apply the law of waiver, are in the same basket. If the parties are at issue upon a great leading fact, and conduct their matters with reference to that great issue, and make no objection at the time with reference to minor matters, they cannot set minor matters up for the first time in a court of law when the case comes to trial. The courts are holding more and more liberally to that rule, and it is a just rule, and in every sense a lawful one.

With reference to the five per cent. clause, I desire to know, Mr. Carver, whether you claim that there was an absolute total loss amounting to five per cent.?

Mr. CARVER: Yes, your honor.

The COURT: According to my figures it amounts to some $2,400.

Mr. CARVER: Yes, your honor; an excess of five per cent. There are two ways of figuring it.

The COURT: In what way?

Mr. CARVER: That is, there is an absolute total loss in regard to 426 reels of barbed wire, and in regard to 572 hay bands.

The COURT: What about the 426 reels of barbed wire?

Mr. CARVER: They were thrown overboard. Of course the difference between the goods that were lost and those that were shipped aboard the Cactus, or the difference between those that were landed at Key West and those that were shipped aboard the Benjamin Hale at Boston, amounts to forty-four tons.

The COURT: You mean that the amount of goods transshipped at Key West——

Mr. CARVER: Was forty-four tons less than were shipped in Boston.

The COURT: How do you value that forty-four tons?

Mr. CARVER: Well, of course your honor will note on the two bills of lading that they do not exactly correspond in every partic-

ular, but on the basis of forty-four tons the goods that were lost would amount to $2,900.

The COURT: I will allow you to go to the jury upon that issue.

Mr. CARVER: That is one point; and the other point can be figured in another way, which makes it amount to more.

The COURT: In what other way do you mean?

Mr. CARVER: The number of hay bands which were shipped, according to the Cactus bill of lading, were 572 less than were shipped according to the Benjamin Hale bill of lading.

The COURT: What you claim, then, is an actual shortage in the shipment from Key West?

144 Mr. CARVER: An actual shortage between the Cactus cargo and the other cargo.

The COURT: That I will allow you to go to the jury upon.

Mr. CARVER: And that is the only question that we can go to the jury upon?

The COURT: No; there is another question.

I have also considered what constitutes an absolute total loss. We all know the great difference among the authorities touching what constitutes such a loss. Some of them go to the extent of holding that if the property at the intermediate port would not be of sufficient value at the port of final destination to pay the additional charges, including the salvage charges and the additional cost of transshipment, this constitutes an absolute total loss.

For the purposes of this case I shall hold, according to my own judgment, what I believe to be the better principle, that inasmuch as a portion of this cargo—a considerable portion, including the staples, and a very large percentage of the fencing wire, was at Key West in a condition to be transshipped, and did in fact arrive at Velasco in specie, and suitable for the purposes for which it was originally intended, although not so suitable as it would have been if it had not been submerged in the sea—there is no absolute total loss, and I cannot therefore allow that question to go to the jury. *Hugg v. Insurance Co.*, 7 How., 595, 605. I so rule on the entire evidence in the case, so that there can be no question that the whole subject-matter will be reserved for the court of appeals, and the rights of the plaintiff will be entirely protected.

Now, then, there is the matter (which I did not speak of in its proper place) of the differences between the charter of the Cactus and that of the Benjamin Hale. Those differences come down to the following items: First, advance freight $700, which had been paid to the Benjamin Hale, and was not credited on the charter of the Cactus; second, the demurrage at Key West, $175; third, five continuous days for discharging at Velasco, instead of quick dispatch and discharge; fourth, expense of discharging at Velasco, $499.60; making a total of $1,354, besides whatever demurrage there was arising from the insertion of the five continuous days for discharging at Velasco instead of quick dispatch.

Now, so far as this is concerned, I will not submit any 145 question to the jury, because I regard all this as one of the minor matters which should have been raised at the time, if

it was to be insisted upon by the plaintiff. That goes with the other minor matters which I think cannot be taken advantage of here now, not having been insisted on at the time when they occurred. If they had then been insisted on they could have been easily adjusted by the underwriters, and the difficulties removed.

The parties have gone to much expense here to prove the facts touching a constructive total loss. I am aware that whatever ruling I make upon these topics will involve serious questions of law, and I am liable to err, and I deem it right and just to the parties that I should direct the jury to make a special finding of constructive total loss or no constructive total loss. So far as the case itself is concerned, I shall allow the plaintiff to go to the jury upon only the five per cent. clause, and the general verdict will be such as results from the five per cent. clause; but I think it proper and just, if the counsel on either side desire—and if the counsel on neither side desire it I will not bother the jury with it—if the counsel on either side desire it, I will let the jury find whether there was a constructive total loss or no constructive total loss.

Mr. CARVER: Your honor, I should like to have two things found, if agreeable to everybody—first, whether there was a constructive total loss under the fifty per cent. rule; and, second, as to whether or not the cost of saving the property, together with the expense of transshipment, amounts to more than the property was worth.

The COURT: I think that, so far as that last proposition is concerned, if the court of appeals shall hold that my rule is wrong you will have no difficulty. I do not want to send any more issues to the jury than are absolutely necessary. Insurance cases are complicated enough anyway. I desire to send to the jury only such issues as are absolutely necessary.

Mr. CARVER: Do I understand that your honor rules that if upon the point that I spoke of, as a matter of law, the evidence——

The COURT: I will deny all your requests on that point. I rule as a matter of law, that so long as part of the property was in condition to be used, there was no total loss. Now, touching the elements of constructive total loss, the elements which would go into it, so far as I can discover, are as follows: We begin with the valuation in the policy, and deduct from that about $1,200 for the cargo not shipped.

146 Mr. CARVER: $266 and some odd cents, your honor. We have agreed on the sum.

The COURT: The cargo not shipped?

Mr. CARVER: Yes, your honor. There is a mistake in that invoice.

The COURT: Very well.

I deduct the cargo jettisoned the first time the vessel touched and I estimate that these leave the policy valuation of the cargo aboard the Benjamin Hale at about $47,000. One-half of that would be $23,500. Now, the question is whether the cargo, the remnants of the cargo, were worth $23,500. I shall allow the jury to get at that by taking the market value at Velasco, deducting

from it all the special charges against the cargo at Key West, including salvage (*Aitchison v. Lohre*, 4 App. Cas., 755); also what was paid on account of the cargo at Key West for general average, if they can find it; and also the excess charges on the bill of lading of the Cactus, amounting to $3,148.54. The only doubt I had yesterday about the charges to be deducted was with reference to the matter of general average. I find that I was right about that, that under the clause in the policy the expenses at an intermediate port, before reaching the port of destination, are to be deducted in getting at the value of the cargo, although if the general average is not due until the arrival of the vessel at the port of destination, some authorities say that the deduction is not to be made.

Mr. LOWELL: Your honor, may I ask if the original freight should not be deducted in that case?

The COURT: No, sir. The law is thoroughly settled about that. The owners pay the freight, and if you take the value of the cargo at the port of destination, I find the rule laid down by Phillips on Insurance, squarely, and that is according to my memory of all the adjustments I have ever seen. It is more fully laid down in a work that was cited here yesterday, Parsons on Marine Insurance, in which it is stated, at page 106, vol. 2 of the edition of 1868: "The expenses may be separated into two classes: First, those incident to delay at the intermediate port, such as the unloading and the reloading of the goods, and all the expenses incurred to render them fit for reshipment; second, the increased freight, if any."

Mr. LOWELL: The increased freight?

The COURT: Yes.

Mr. LOWELL: Naturally, the increased freight.

The COURT: Yes; that is the rule.

Mr. LOWELL: I must have misunderstood your honor in what you said before, then. Of course that is so.

The COURT: Now I will let you go to the jury on the question of the five per cent. loss, and on the special finding touching
147 the question whether or not there was a constructive total loss, following the lines which I have indicated.

This has all been in the presence of the jury, and it will be regarded as a part of the charge, and any part of it may be excepted to.

Mr. CARVER: How does your honor rule with regard to the advanced freight that was paid? Is that included as a part of the loss under the five per cent.?

The COURT: No; you may proceed, gentlemen, to the jury.

Mr. STIMSON: May it please the court, I think that it is barely possible that we might be able to come to some agreement if we may be allowed five minutes.

The COURT: Very well; then the jury may take a recess of ten minutes.

After recess the court said to the jury:

You have heard, gentlemen, what I have said touching the rulings of law in this case, and in order to save repetition I will adopt what I have already said as part of my charge to you. It has all been

said in your presence, and unless I so adopt it, I must repeat it all, which would be a useless ceremony. Therefore it will go in the record as a part of my charge.

There are, in marine insurance, three kinds of losses,—one, an actual total loss, as, for example, where the cargo is sunk in the bottom of the sea, and is never recovered, or where, from the dangers of the sea, the essential nature of the cargo is changed, as, for instance, where hides become putrified, so that they no longer remain as hides,—where, indeed, the entire cargo disappears or where its substance is changed. Then there are cases of partial loss, which you all understand without any explanation. Then there are cases of what we call constructive total loss,—that is, where the cargo is not destroyed, or the substance changed, in the way that I have expressed it to you, but where, on account of certain marine injuries happening to the cargo, amounting to a certain percentage, the courts, under certain circumstances, allow the parties to regard the case as one of a constructive total loss. In such a case there is ordinarily an abandonment, such as you have heard read in this case; and the result is that where there is a constructive total loss, the plaintiff recovers the face of the policy, with certain deductions, which are not to be considered here.

Well, gentlemen, the rules which I have laid down in this
148 case, in your hearing, prevent you from allowing the plaintiff for any loss except an actual total loss, and that is because the parties have stipulated as follows, "free of particular average." That is a memorandum, or a rider, put upon the policy, and the construction I put on those words is such as would prevent the plaintiff from recovering either for a partial loss or for a constructive total loss, or for anything except an actual total loss.

So far as that is concerned, I take the responsibility of ruling the law as I deem right, and the same as to all other points in the case. You are to accept the law from me, and you will render such a verdict or verdicts as I direct you to render under the law as I give it to you. If an error is committed by me, you are not responsible for it, but it will be rectified by the court of appeals.

By accepting the rules of law which I give you, and acting on them, you will comply with your oaths as jurors, and the rights of all the parties will be reserved and finally settled by the court of appeals.

I say, gentlemen, that there can be no recovery except for an actual total loss, as I have described it to you; and I will say to you, that on the facts in this case there is no actual total loss, with the minor exception to which I will soon call your attention, inasmuch as a portion of the cargo came into the port of distress in its natural, normal condition, and in that condition was capable of being transported, and was, in fact, transported, to the port of final destination. Not only could there be no recovery for actual total loss for the cargo as a whole, but if the policy stopped there, there could be no recovery for actual total loss of any part of it, although a part was actually sunk in the bottom of the sea. To relieve the parties from that hardship, comes in the following: "but liable for

absolute total loss of a part if amounting to five per cent." That means, taking it all together, that while in this case there can be no recovery for an actual total loss of the whole cargo, there can be for the total loss of the part that was jettisoned at the time of the stranding, and perhaps some other parts, which I need not call your attention to especially,—there can be a recovery for those parts, if they amount to five per cent. of the entire valuation.

On my intimation to the counsel that I should rule the law
149 as has been stated to you, and in your presence, they have agreed that the amount of loss under the five per cent. clause was $2,500, to be without interest. Therefore, gentlemen, on the strength of that agreement, and on the rules of law as I have stated them in your presence, and to you, you will find a verdict for the plaintiff for $2,500, without interest, and no more; and the clerk will pass you the form of verdict for that purpose.

But, gentlemen, the parties have been to much expense and trouble in proving the facts in this case, contingent upon my ruling that they might recover for a constructive total loss. Of course the counsel could not see in advance how I might rule. For aught that they could know in advance, I might have ruled as I have ruled, or I might have ruled that the plaintiff could recover for a constructive total loss; and therefore, gentlemen, they have gone to the expense and trouble of putting in the proofs here bearing on the question of constructive total loss, and it is not right that they should be put to the expense of travelling over that ground again in the event the court of appeals should hold that I am wrong in my ruling. Therefore, I intimated to counsel that I would allow you to pass on the question whether or not there was a constructive total loss. That will not be a part of your verdict, but it will be a special finding. I need not go into any extended remarks, because I have explained to you, or in your hearing, the rule which will enable you to determine whether or not there was a constructive total loss. It is the usual fifty per cent. provision—that is to say, whether the cargo was damaged to the extent of fifty per cent., with certain limitations, certain deductions, which I have already explained. Moreover, on the rules of law which I have stated, which of course bind the counsel for this trial, and as to which they have a right to go before the court of appeals for that court to determine on this part of the case, whether I am right or wrong, the counsel have agreed that with the rules of law applied to them as I have stated them, and the instructions that I have said I should give you, the facts entitle the plaintiff to a finding that there was a constructive total loss. Therefore, gentlemen, I ask you to return a verdict for the plaintiff for $2,500; and also to return a special finding that there was a constructive total loss.

150 Mr. CARVER: I have made certain requests for rulings, all of which I understand are denied.

The COURT: No; I want to say that my rule is not to allow exceptions based on requests for rulings, unless the requests are brought to my attention in connection with noting the exceptions at the close of the trial.

After conferring with counsel, the court said further:

Mr. Foreman and gentlemen of the jury, there are one or two other points as to which the parties desire to except, and which, therefore, require me to make further statements to you. It will not change the verdict and special finding which you are to return under the direction of the court. The defendant desires to make an exception touching the abandonment which was read in the case. I will simply say that, under the circumstances of the case, the defendant cannot object to the abandonment for any reason; that no objection to its form was made at the time when the abandonment was received by the defendant; that subsequently in its letter the defendant put itself directly and squarely on the ground that it was liable only for an actual total loss, and could not be for constructive total loss. If this was correct, no abandonment was of importance in the case. Not having objected at that time to the form of the abandonment, even if it was not in all respects sufficient, they cannot object now. My judgment is that the abandonment was sufficient under the circumstances. At the present time, when underwriters receive information from all parts of the world, and sometimes know the facts of a wreck sooner and better than the owners of the vessel or cargo wrecked, abandonments are very apt to be brief and summary in their nature.

It is enough that they bring to the attention of the underwriters such facts as the underwriters need to know in connection with the other facts which they know, and that they express an intention to surrender the property. Under the circumstances of this case, with the knowledge which it is apparent the underwriters had at the time the abandonment was made, I regard the abandonment as sufficient; but even if it was not sufficient, the underwriters, by placing their defence upon the fundamental ground which I stated to you, waived objections to the form of the abandonment and cannot insist on them at the present time.

The plaintiff makes certain exceptions touching certain
151 & 152 requests as to the effect of the sale of the cargo at Velasco. There is no doubt that, under some circumstances, the mere sale of a cargo at a distant port by a process of a court constitutes an actual total loss; but that does not apply to this case, because in this case the fact shows, and it cannot be disputed and is not disputed, that the captain advised the defendant's agent at Houston of his arrival at Velasco on the day of his arrival there, so that the plaintiff had ample opportunity to pay the freight and stop proceedings in court, if it had desired so to do. This is another of these minor matters, which really does not touch the controversy between the parties, and which the parties did not insist on at the time, because their controversy went deeper than all such matters, and which, therefore, they cannot insist on at the present time.

In what I said this morning in your presence I laid down certain conclusions without distinguishing between them, whether they were conclusions of law or conclusions which result from the fact that there is not sufficient evidence in this case for you to find other than I have directed you to find. All the propositions which I have laid

down to you are not strictly propositions of law, but they are propositions flowing from the fact, in some cases, that they involve questions of law, and in the other cases, that there is not sufficient evidence to justify you in finding other than I have instructed you to find.

Is there anything further, gentlemen, anything further for me to say to the jury?

Mr. CARVER: No, your honor.

Mr. LOWELL: I understood, that what your honor previously said, covered the matter of salvage and general average.

The COURT: Undoubtedly that is all covered by what I said this morning. Mr. Stenographer, will you note that both parties noted exceptions after the charge and before the jury retired to consider their verdict, and their notes of exceptions I now pass to the clerk to be filed by him.

153 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court for the district of Massachusetts.

Before Colt, Nelson, and Webb, JJ.

Opinion of the Court.

September 7, 1897.

WEBB, *J.*:

In the course of the disaster a part of the property insured, exceeding in amount five per cent. of the whole, was totally lost, and for this a verdict was taken for the plaintiff by consent. As to the rest of the property insured it is evident that the principal question in these cases is the ruling that the insurance company is not liable for a constructive total loss. The Massachusetts court has held that a policy like the one now before us, containing a warranty against partial loss, does cover a constructive total loss.

Kettell v. Alliance Insurance Co., 10 Gray, 144; *Heebner v. Eagle Insurance Co.*, 10 Gray, 131; *Greene v. Pacific Mutual Insur-*
154 *ance Co.*, 9 Allen, 217; *Mayo v. India Mutual Insurance Co.*, 152 Mass., 172.

These decisions of the State court, however, are not conclusive upon this court.

"The questions under our consideration, are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they are certainly entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment." *Carpenter v. Providence Washington Insurance Co.*, 16 Peters, 495, 511.

The supreme court, in the exercise of the duty so avowed, has examined this question and pronounced the judgment that, under such a policy as that in these cases, a constructive total loss is not covered. *Marcardier v. Chesapeake Insurance Co.*, 8 Cranch, 39; *Morean v. U. S. Insurance Co.*, 1 Wheaton, 219; *Hugg v. Augusta Insurance and Banking Co.*, 7 How., 595.

In *Insurance Co. v. Fogarty*, 19 Wallace, 640, that court reviewed these cases without in any way qualifying them. They are imperative authorities here, and, regarding them as controlling us, there will be no advantage in extending this opinion by citation and discussion of the numerous and conflicting decisions of State courts upon the same question.

It follows that the plaintiffs had not the right to abandon, and enquiry into the sufficiency of the assumed abandonment is of no use.

It has been urged upon us that insurers may make themselves liable by accepting an abandonment and their subsequent dealing with the property, even when there is no right to abandon. Allowing this to be so, we agree with the circuit judge that in this case the evidence was not sufficient to authorize the jury to find that the defendant ever accepted the abandonment, or did anything in respect to the property insured that was equivalent to an acceptance.

This court does not entertain the view of the circuit court that the underwriters chartered the Cactus and forwarded by her the cargo from Key West to Velasco. Considering the whole evidence upon that point, the sounder opinion is thought to be, that those things, if not done by the immediate action of the captain of the Benjamin Hale, they were at least done under his authority and with his approval. Before he left Key West, but after the Benjamin Hale and the cargo had arrived there, he authorized Taylor & Curry, the agents at that port of his vessel, to charter the Cactus if they could. When she was afterwards chartered, the charter-party purports to be made and concluded between the agents of the Cactus, of the first part, and John Hall, master of the Benjamin Hale, of the second part; and it is signed, "John Hall, master Sch. Benj. Hale." It is

true that the underwriters' agents advised that the cargo be forwarded. But leaving this question undetermined, the underwriters under the "sue and labor" clause of the policy, cannot be charged with the acceptance of an abandonment, especially as the insurers had no right to abandon, simply because they caused the property to be preserved and removed from a place where there was no agent of the assured, and where there was no market, and where there was no adequate means for its protection, to the place to which it was originally shipped, where were a good market and conveniences for its protection, and there offering it to the representatives of the insured to whom it had been in the first instance consigned. Such labor and care for the preservation of the property did not
156 make them liable for a total loss, if the property was forwarded by the first available conveyance and without unnecessary delay, as in this case.

The decision of this court in *Monroe v. British and Foreign Marine Insurance Co.*, 52 Fed. Rep., 777, disposes of the contention that the sale at Velasco entitles the plaintiff to recover for a total loss.

Finally, no error is found in the court below, and its judgment will be affirmed, but as both parties have sued out writs of error, and neither has sustained his exceptions, the costs of this court must be equally divided.

Judgment affirmed; costs of the circuit court of appeals to be divided equally.

157 & 158 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court for the district of Massachusetts.

Judgment.

September 7, 1897.

These causes came on to be heard January 15 and 16, 1897, upon the transcript of the record of the circuit court of the United States for the district of Massachusetts, filed November 25, 1895, and were argued by counsel.

On consideration whereof, it is now, to wit, September 7, 1897,

ordered and adjudged as follows: Judgment affirmed; costs of the circuit court of appeals to be divided equally.

By the court:

JOHN G. STETSON, *Clerk.*

159 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

Petition for Rehearing and Request that Certain Questions may be Certified to the Supreme Court of the United States.

(Filed October 14, 1897.)

And now, a decision having been rendered by this court overruling the exceptions of the plaintiff and affirming the judgment of the circuit court, the plaintiff in the circuit court, the plaintiff in error in this court, respectfully asks this honorable court to grant a rehearing of this cause and certify certain questions to the Supreme Court of the United States, for the following reasons:

1. Because the plaintiff could recover in the State court of Massachusetts where the suit was originally brought, and from which it was removed to this court by the defendant, a foreign corporation doing business in Massachusetts.

2. Because the contract of insurance to be here construed was made in Massachusetts.

3. Because the Supreme Court of the United States has never directly passed upon the question of a recovery of a constructive total loss of cargo under facts like those at bar, and that the dicta of that court, by which this court feels bound, is contained in decisions delivered by that court over seventy years ago.

160 4. Because in the case like the one at bar the plaintiff could recover, provided the suit had been brought in England, the home of the defendant corporation.

5. Because there is evidence that would warrant a jury in finding that the plaintiff accepted the abandonment.

6. Because there was evidence that would warrant the jury in finding that there was an absolute total loss under the policy.

The plaintiff in error respectfully requests that a rehearing be granted, and that under section 6 of chapter 517 of the acts of Congress of March 3, 1891, being the act creating circuit court of appeals, this honorable court certify to the Supreme Court of the United States the record in the aforesaid case, and ask of said court the following questions and propositions of law, viz:

First. As to whether or not there was error on the part of the circuit judge in not submitting to the jury the right of the plaintiff to recover for a total loss.

Second. As to whether or not there was sufficient evidence for the jury to find that there was an acceptance on the part of the defendant company of the abandonment offered by the plaintiff.

Third. As to whether or not the failure of the defendant corporation to discharge a lien created by it amounted to an acceptance of the abandonment.

Fourth. As to whether or not the cargo injured was of any commercial value for use for which it was made.

Fifth. As to whether or not the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property, and made a total loss of the cargo under the policy.

Sixth. As to whether or not the plaintiff could recover for a constructive total loss under a policy like the one at bar, provided there was a seasonable abandonment, and provided the loss of the property injured was in excess of fifty per cent. of the value.

Seventh. As to whether or not the plaintiff could recover under this policy, by reason of the perils insured against, the injury to the property and cost of saving the same, together with the cost of transportation to the port of destination, amounting to more than the value of the property on its arrival at the port of destination.

Eighth. As to whether or not the court should have ordered
161 a verdict for the plaintiff for the amount sued for, with interest from May 29, 1893.

Ninth. As to whether or not the value of the goods shipped in this instance was $48,800 for all the purposes of this case.

Tenth. As to whether or not the policy of marine insurance, having been made in the State of Massachusetts, should have been construed according to the law of Massachusetts.

Eleventh. As to whether or not there could be a recovery for a constructive total loss of cargo under a policy of marine insurance when the words used were "free of particular average."

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Attorneys for Washburn & Moen Manufacturing Co.

Argument.

The questions decided in this case have never been decided by the Supreme Court of the United States, and the doctrine laid down in the decision of this honorable court is founded merely on a dicta of the Supreme Court of the United States, a case presenting the question never having been decided by that court.

If this action had been tried either in the State courts of Massachusetts, in the State courts of New York or in the courts of England, the plaintiff would have been entitled to recover upon the evidence which was before the jury. The plaintiff would have been entitled to recover in Massachusetts on the ground that this was a case of constructive total loss, notwithstanding the words "free of particular average" used in the policy of insurance. It would have been entitled to recover in England on the ground that the cost of saving the property and bringing it to the port of destination was more than

the property was worth upon its arrival at that port. It would also have been entitled to recover on the ground that the sale of the property at Velasco, Texas, was a sale by judicial process which made the property a total loss to the plaintiff. It would have been entitled to recover in the courts of New York on the ground that there was sufficient evidence to warrant the jury in finding that the defendant by its acts accepted the abandonment.

162 It is very desirable that on all matters of commercial law there should be a uniformity of decisions, and especially is this true with regard to matters of marine insurance where the property is constantly moving into different jurisdictions.

If the decision as laid down by this court is to prevail, then a different law would be presented in Massachusetts between citizens of that State and citizens of other States and foreign citizens. Again, if the amount in dispute was less than two thousand dollars ($2,000), a different rule would prevail, inasmuch as there could be no removal to the circuit court of the United States, even where the corporation is organized under the laws of some other State than of that in which the suit is brought. This surely is a condition of things which should not exist, and, inasmuch as the Supreme Court of the United States has not passed upon these questions, we submit that they should be submitted to that court for final adjudication, in the interest at least of uniformity in the law.

Certificate of Counsel.

We, Eugene P. Carver and Edward E. Blodgett, certify that we are attorneys for the plaintiff in error; that in our opinion the foregoing petition is well founded and is deserving of judicial consideration, and we hereby certify that the same is not intended for delay.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Counsel for the Washburn & Moen Mfg. Co.

163 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error.
} No. 156.

Order of Court.

October 30, 1897.

Upon consideration of the petition for rehearing, and request that certain questions may be certified to the Supreme Court of the United States, filed October 14, 1897, no judge who concurred in

the judgment desiring that the petition should be granted, or permitted to be argued, the petition is denied.

By the court:

JOHN G. STETSON, *Clerk.*

164 *Clerk's Certificate.*

United States Circuit Court of Appeals for the First Circuit.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that printed pages numbered 1 to 151, inclusive, hereto prefixed, contain and are true copies of writs of error, returns thereon of the circuit court of the United States for the district of Massachusetts, and transcript of the record of said circuit court, annexed to and returned with said writs of error, the same being the entire record upon which the causes entitled—

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error;	No. 156.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error, *v.* WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error,	No. 157.

were lately heard and decided in said circuit court of appeals.

I further certify that printed pages numbered 153 to 157, inclusive, hereto prefixed, contain and are true copies of the opinion of said circuit court of appeals, announced September 7, 1897, and of the judgment of said court entered in accordance therewith.

I further certify that printed pages numbered 159 to 163, inclusive, hereto prefixed, contain and are true copies of a petition for rehearing, and request that certain questions may be certified to the Supreme Court of the United States, filed in the first of said
165 causes, No. 156, Washburn and Moen Manufacturing Company, plaintiff, plaintiff in error, *v.* Reliance Marine Insurance Company, defendant, defendant in error, and of the order of court denying the same.

I further certify that said writs of error, returns thereon, transcript of record, opinion and judgment of the circuit court of appeals, petition for rehearing and request for certification, and order of court denying the same, remain on file and of record in said causes in said United States circuit court of appeals, and that said pages above named, containing true copies thereof, contain and are a true copy of the record and all proceedings in said causes in said United States circuit court of appeals to and including November 10, 1897, and that the issuing of the mandate upon said final decree

of September 7, 1897, has been stayed until the further order of court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this tenth day of November, 1897.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

166 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Being informed that there is now pending before you a suit in which The Washburn & Moen Manufacturing Company is plaintiff in error and The Reliance Marine Insurance Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Massachusetts, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

167 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return of United States Circuit Court of Appeals for the First Circuit on Writ of Certiorari.

And now, here, the judges of the United States circuit court of appeals for the first circuit make return of this writ of certiorari by annexing hereto and sending herewith, under the seal of the said court, a true and attested copy of an agreement filed in the clerk's office of said circuit court of appeals to be used in place of a certified copy of the record of said cause in making this return.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, have hereto set my hand and the seal of said court, at Boston, in the first judicial circuit, this second day of February, A. D. 1898.

Seal United States Circuit Court of Appeals, First Circuit.

JOHN G. STETSON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN & MOEN MANUFACTURING COMPANY, Plaintiff in Error, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant in Error.	No. 156.

(Filed in the clerk's office February 2, 1898.)

In the above-entitled case it is hereby agreed that the certified copy of the transcript of the record heretofore filed in the United States Supreme Court with a petition for a writ of certiorari in case numbered 525 of the October term, 1897, may be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on said petition and filed in this court.

[Seal United States Circuit Court of Appeals, First Circuit.]

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Attorneys for Plaintiff in Error.
FREDERIC J. STIMSON,
Attorney for Defendant in Error.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

168 [Endorsed:] Supreme Court of the United States. No. 525, October term, 1897. The Washburn & Moen Manuf'g Co. *vs.* The Reliance Marine Insurance Co. Writ of certiorari and return thereon of the United States circuit court of appeals for the first circuit.

169 [Endorsed:] Case No. 16,738. Supreme Court U. S., October term, 1897. Term No., 525. The Washburn & Moen Man'f'g Co. *vs.* The Reliance Marine Insurance Co. Writ of certiorari and return. Office Supreme Court U. S. Filed Feb. 4, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,738. U. S. C. C. of appeals, first circuit. Term No., 203. The Washburn and Moen Manufacturing Company, petitioner, *vs.* The Reliance Marine Insurance Company (Limited). Filed December 4, 1897.